

# **TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES.**

**COURT OF APPEALS, NEW YORK.**

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**No. 23,549**

**THE NATIONAL CITY BANK OF NEW YORK, APPELLANT,**

**HENRY D. HOTCHKISS, AS TRUSTEE IN BANKRUPTCY  
OF HENRY S. HASKINS ET AL.**

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**No. 23,550**

**HENRY D. HOTCHKISS, AS TRUSTEE IN BANKRUPTCY  
OF HENRY S. HASKINS ET AL., APPELLANT,**

**THE NATIONAL CITY BANK OF NEW YORK.**

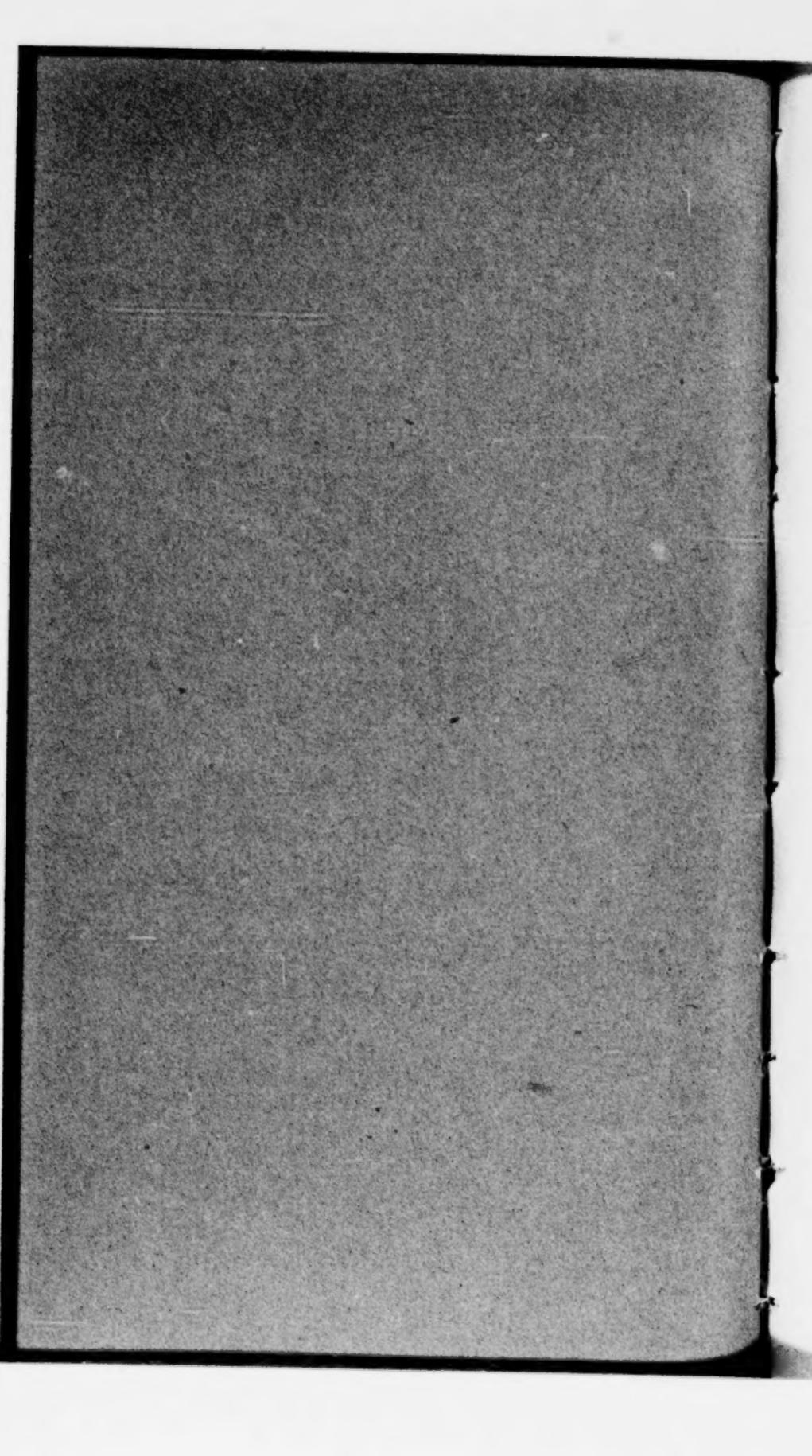
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**APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.**

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**FILED FEBRUARY 27, 1908.**

**(23,549 and 23,550)**



(23,549 and 23,550)

SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1912.

No. 974.

THE NATIONAL CITY BANK OF NEW YORK, APPELLANT,  
vs.

HENRY D. HOTCHKISS, AS TRUSTEE IN BANKRUPTCY  
OF HENRY S. HASKINS ET AL.

No. 975.

HENRY D. HOTCHKISS, AS TRUSTEE IN BANKRUPTCY  
OF HENRY S. HASKINS ET AL., APPELLANT,

vs.

THE NATIONAL CITY BANK OF NEW YORK.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.

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**United States District Court,  
SOUTHERN DISTRICT OF NEW YORK.**

**HENRY D. HOTCHKISS, as Trustee in  
Bankruptey of Henry S. Haskins  
and HENRY LEVERICH, individually,  
and as co-partners, with  
FANNIE G. LATHROP, as special  
partner, under the firm name of  
Lathrop, Haskins & Company,  
Bankrupts,**

**Complainant, Appellee and  
Appellant,**

**AGAINST**

**THE NATIONAL CITY BANK OF NEW  
YORK,  
Defendant, Appellant and  
Appellee.**

**IT IS HEREBY STIPULATED that the record on appeal to  
the United States Circuit Court of Appeals for the  
Second Circuit from the decree, entered herein April  
11, 1912, shall consist of the following papers and pro-  
ceedings, the printing of other papers composing the  
balance of the record herein being waived.**

1. This Stipulation.
2. Statement of docket entries.
3. Subpoena.

## Stipulation.

5            4. Bill of Complaint.  
5. Answer.  
6. Replication.  
7. Order of Reference.  
8. Stenographer's Minutes, with all Exhibits,  
except as hereinafter stipulated.  
9. Report of Special Master, dated October  
17, 1911.  
10. Stipulation as to value of securities on  
October 17, 1911.  
6            11. Notice of motion to confirm Report of  
Special Master.  
12. Complainant's Exceptions to Report of  
Special Master.  
13. Defendant's Exceptions to Report of  
Special Master.  
14. Opinion of HAND, J., confirming Report.  
15. Decree entered January 15, 1912.  
16. Defendant's Account.  
17. Complainant's Charge to Defendant's  
Account.  
7            18. Stenographer's Minutes on Reference on  
Accounting, with all Exhibits.  
19. Report of Special Master on Accounting,  
dated March 5, 1912.  
20. Notice of Motion to disallow Report.  
21. Complainant's Exceptions to Report.  
22. Opinion of HAND, J., confirming Report.  
23. Final Decree, entered April 11, 1912.  
24. Defendant's Petition for Appeal and  
Supersedeas, and allowance.  
8            25. Defendant's Assignment of Errors.  
26. Defendant's Undertaking on Appeal.  
27. Complainant's Petition for Appeal, and  
allowance.  
28. Complainant's Assignment of Errors.  
29. Stipulation waiving Citation.

IT IS FURTHER STIPULATED, that Plaintiff's Exhibit 2  
of March 1st, 1911, being the schedules of assets and  
liabilities filed by the firm of Lathrop, Haskins &

Company in bankruptcy, need not be printed in full, 9  
but a summary thereof shall be printed and the  
schedules may be produced and referred to by the  
Court or by either party, all without prejudice to the  
defendant's objection and exception to the admission  
in evidence of the said schedules.

IT IS FURTHER STIPULATED that the stipulation herein,  
dated October 24, 1911, shall be printed in place of  
Schedule A1, annexed to the Stenographer's Minutes.

New York, July 25, 1912.

ABRAM I. ELKUS & WM. S. MCGUIRE, 10  
Solicitors for Complainant.

SHEARMAN & STERLING,  
Solicitors for Defendant.

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Stipulation approved, and printing of record di-  
rected accordingly.

LEARNED HAND, 11  
*U. S. D. J.*

July 26th, 1912.

13

DISTRICT COURT OF THE UNITED STATES,  
 SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee,  
 etc.,

AGAINST

14

NATIONAL CITY BANK.

**Statement of Docket Entries.**

1910.

May 6 Filed Bill of Complaint.  
 Sealed and issued Summons.

June 7 Filed Notice of Appearance.

15 July 5 Filed Answer.

July 12 Filed Replication.

Aug. 11 Rec'd Note of Issue.

Sept. 7 Filed Supcœna, no return.

Oct. 11 Case called and Reference.

1911.

Sept. 7 Filed and entered Order of Reference to  
 Charles F. Brown.

Oct. 18 Filed Commissioner's Report, Testimony  
 and Exhibits.

16 Oct. 26 Filed Stipulation as to Quotations.

Oct. 26 Filed Stipulation as to Interest and Divi-  
 dends.

Oct. 26 Filed Stipulation amending Complaint.

Nov. 17 Filed Exceptions to Special Master's Re-  
 port.

Dec. 30 Filed Opinion on exceptions (HAND, J.).

1912.

Jan. 15 Filed and entered Order on Exceptions.

Mar. 6 Filed Special Master's Report and Ex-  
 hibits.

**Subpoena.**

5

Apr.	5	Filed Opinion No. 32, Report confirmed.	17
		(HAND, J.)	
Apr.	11	Filed and entered final decree.	
Apr.	17	Filed petition for Appeal. Filed assignments of error. Filed undertaking on appeal.	
May	1	Filed petition for appeal and allowance and assignment of errors.	
May	7	Filed and entered order extending time to file record to June 17, 1912.	
June	13	Filed and entered order extending time to file record to July 17, 1912.	18
July	15	Filed stip. and order extending time to file transcript to August 17, 1912.	
July	29	Filed and entered order as to record on appeal.	
Aug.	8	Filed and entered order substituting A. I. Elkus and Wm. A. Barber, attorneys for complainant.	
Aug.	16	Filed and entered order extending time to file record to Sept. 3, 1912.	19

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**Subpoena.**

THE PRESIDENT OF THE UNITED STATES OF AMERICA,  
TO NATIONAL CITY BANK, GREETING :

20

You are hereby commanded that you personally appear before the Judge of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit in Equity, on the first Tuesday of June, A. D., 1910, wheresoever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by Henry D. Hotchkiss, as Trustee in bankruptcy of Henry S. Haskins, *et al.*, and to do further and receive what the said Court shall have considered in that behalf. And

21 this you are not to omit under the penalty on you of Two hundred and fifty dollars.

Witness, Honorable GEORGE B. ADAMS, GEORGE C. HOLT, CHARLES M. HOUGH and LEARNED HAND, Judges of the District Court of the United States for the Southern District of New York, at the City of New York, on the 6th day of May, in the year one thousand nine hundred and ten and of the Independence of the United States of America, the one hundred and thirty-fourth.

22

THOMAS ALEXANDER,  
Clerk.

A. I. ELKUS & W. S. McGUIRE,  
Compl'ts. Sol'rs.

---

23 The defendant is required to enter appearance in the above cause in the Clerk's office of this Court, on or before the first Tuesday of June, 1910, or the bill will be taken *pro confesso* against it.

[SEAL]

THOMAS ALEXANDER,  
Clerk.

24

25

**Bill of Complaint.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee in  
 Bankruptcy of Henry S. Haskins,  
 Henry Leverich, individually,  
 and Fannie G. Lathrop, special  
 partner, and as co-partners trad-  
 ing under the firm name of  
 Lathrop, Haskins & Company,  
 Complainant,

26

AGAINST

NATIONAL CITY BANK,  
 Defendant.

27

TO THE HONORABLE JUDGES OF THE UNITED STATES  
 DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
 NEW YORK:

The complainant, Henry D. Hotchkiss, as trustee in  
 bankruptcy, a citizen of the United States and a resi-  
 dent of the Southern District of New York, now comes  
 into this Court by Abram I. Elkus and William S.  
 McGuire, his attorneys, and complains of the above  
 named defendant, the National City Bank, incor-  
 porated under the laws of the United States of America,  
 having its principal place of business in the State of  
 New York, in the Southern District of New York, and  
 alleges:

28

I. That on or about the 19th day of January, 1910,  
 a petition in involuntary bankruptcy was filed against  
 Henry S. Haskins, Henry Leverich and Fannie G.  
 Lathrop individually and as co-partners trading under  
 the firm name of Lathrop, Haskins & Company, in the

29 office of the Clerk of the United States District Court for the Southern District of New York, pursuant to the provisions of an act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," and such proceedings were had thereon that by decree of the United States District Court for the Southern District of New York, Henry S. Haskins, Henry Leverich, individually, and Fannie G. Lathrop, as special partner, and the firm of Lathrop, Haskins & Company, were duly adjudged bankrupts.

30 II. That thereafter an order was entered referring all proceeding in connection with such bankruptcy to the Hon. Stanley W. Dexter, as Referee in bankruptcy and a first meeting of creditors was duly held and complainant herein was duly appointed by order of the said Referee, the trustee in bankruptcy of Henry S. Haskins, Henry Leverich, individually, Fannie G. Lathrop, as special partner and of the firm of Lathrop, Haskins & Company. This complainant has duly qualified by the giving of the bond required of him which bond has been duly approved.

31 III. That before the commencement of this action, an order was made by the Hon. Stanley W. Dexter, as Referee in bankruptcy, authorizing the complainant to bring this suit.

IV. That on or about the 19th day of January, 1910, the defendant obtained the transfer to it of a portion of the property of the firm of Lathrop, Haskins & Company, to wit: certain securities of a value at the time of the said transfer of approximately \$150,700. A list of the said securities so received and accepted by the defendant and taken into its possession is hereto annexed and marked "Exhibit A."

V. That the said defendant received a transfer of the said securities in payment of and as security for certain pretended loans and advances made to the firm of Lathrop, Haskins & Company amounting to \$117,000.

VI. At the time of the said transfer and at the time of the acceptance of the said securities by the defendant, the firm of Lathrop, Haskins & Company, and the individual members thereof, were insolvent and the total amount of the assets, at a fair valuation, was less than sufficient in amount to pay the debts of the said firm and the individual members thereof. 33

VII. That at the time of the receipt of the said securities and the taking possession of the same by the defendant, the defendant had reasonable cause to believe that it was intended by said transfer to give a preference to the said defendant and had reasonable cause to believe that the firm of Lathrop, Haskins & Company and the individual members thereof were insolvent. 34

VIII. That the effect of the said transfer will be to enable the defendant to obtain a greater percentage of its alleged debt than any other of the creditors of the firm of Lathrop, Haskins & Company and the individual members thereof of the same class. 35

IX. That the total assets which have come into the possession of this complainant as trustee, at a fair valuation, exclusive of the property transferred by the said firm and the individual members thereof, with intent to hinder, delay and defraud their creditors, is insufficient to pay the provable claims of the creditors of the above-named bankrupts, the deficiency being more in amount than the value of the property and securities sought to be recovered by this action. 36

X. That the said transfer was made by the firm of Lathrop, Haskins & Company and the individual members thereof with the intent on their part to prefer the National City Bank over all other creditors of the said firm and the individual members thereof of the same class.

WHEREFORE, complainant demands judgment against the defendant decreeing that the transfer of the said

**37** securities constitutes a preference and is in violation of the Act of Congress approved July 1st, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States, as amended", and that the same be set aside and declared to be wholly void and decreeing that the defendant deliver up to the complainant herein all of the said securities so transferred or the value and proceeds thereof and decreeing that the defendant account to this complainant for the value of any of  
**38** the securities which may have been sold or transferred by the defendant and for such other and further relief as may be just and proper in the premises.

May it please your Honor to grant unto this complainant a writ of subpoena directed to the National City Bank commanding it at a certain date, under a certain penalty, to personally appear before this Honorable Court and then and there full, true and perfect answer to make to all and singular the premises and further to stand to and perform and abide by such further order, direction and decree as to this Honorable Court may seem meet.

**39**

(Signed)            HENRY D. HOTCHKISS.  
 Trustee in Bankruptcy.

ABRAM I. ELKUS & WM. S. MCGUIRE,  
 Attorneys for Complainant.

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### Schedule "A."

200 Shares of stock of Southern Pacific Railroad Co.  
 200 Shares of the Common stock of Philadelphia & Reading Railroad.

100 Shares of stock of New York Central and Hudson River R. R.

300 Shares of the Common Stock Chicago, Rock Island & Pacific.

100 Shares of the Capital stock of Consolidated Gas **41**  
Co.

100 Shares of the Common Stock of the American  
Smelting & Refining Company.

200 Shares of Hocking Coal & Iron Co.

300 Shares of Common Stock of Missouri, Kansas &  
Texas Railroad.

100 Shares of Common Stock of Wabash Railroad.

250 Shares Anaconda Copper Co.

100 Shares Texas Pacific Railroad.

100 Shares of Common Stock of Kansas City **42**  
Southern R. R.

100 Shares of Common Stock of National Lead Co.

50 Shares of common stock of U. S. Steel Corpora-  
tion.

\$10,000 Union Pacific Railroad convertible four per  
cent. bonds.

CITY AND COUNTY OF NEW YORK:

HENRY S. HOTCHKISS, being duly sworn, says that he  
is the complainant in this action ; that he has read the  
foregoing complaint and knows the contents thereof ;  
that the same is true of his own knowledge except as  
to the matters therein stated to be alleged on informa-  
tion and belief, and as to those matters he believes it  
to be true.

HENRY D. HOTCHKISS.

Sworn to before me this 3rd }  
day of May, 1910. }

**43**

**44**

WALTER L. MERRITT,

(SEAL) Notary Public,  
N. Y. County.

45

**Answer.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

46

**HENRY D. HOTCHKISS**, as Trustee in  
bankruptcy of **Henry S. Haskins**,  
**HENRY LEVERICH**, individually, and  
**FANNIE G. LATHROP**, Special partner,  
and as co-partners trading  
under the firm name of **Lathrop,  
Haskins & Company**,

Complainant,

Answer.

AGAINST

**NATIONAL CITY BANK OF NEW YORK**,  
Defendant.

47

The defendant, the National City Bank of New York (sued as "National City Bank"), answering the bill of complaint herein, alleges on information and belief, as follows :

I. Referring to Article I of the said bill of complaint, the defendant avers that it has no knowledge nor information sufficient to form a belief as to the truth of any of the allegations therein contained ; and it leaves the complainant to make such proof thereof as it may be advised.

II. Referring to Article II of the bill of complaint, the defendant avers that it has no knowledge nor information sufficient to form a belief as to the truth of any of the allegations therein contained ; and it leaves the complainant to make such proof thereof as it may be advised.

III. Referring to Article III of the bill of complaint, the defendant avers that it has no knowledge nor information sufficient to form a belief as to the truth of any allegation therein contained; and it leaves the complainant to make such proof thereof as it may be advised. 49

IV. Referring to Article IV of the bill of complaint, the defendant admits and avers that on or about January 19, 1910, the securities therein described, of approximately the value therein specified, were delivered to the defendant by the said firm of Lathrop, Haskins & Company, as security for monies loaned, on that day, by the defendant to the said firm, and pursuant to the agreement and understanding with the said firm, hereinafter referred to, at the time of lending the said monies, and pursuant also to the long established usage, hereinafter referred to, existing generally in the business conducted between banks and the Stock Exchange Brokers in the City of New York, of which usage the customers and creditors of the said firm were well aware. 50

V. Referring to Article V of the bill of complaint, the defendant admits and avers that it received the said securities as collateral for certain loans and advances made by the defendant to the said firm of Lathrop, Haskins & Company, amounting to about \$117,000, and not in payment or satisfaction of any loans or advances; and it denies that the said loans and advances were or at any time have been pretended loans or advances; and it avers that the said loans and advances were actually made, in good faith, for a valuable consideration, and as part of the same transaction by which the said securities were delivered to the defendant, as collateral security therefor in accordance with the agreement, understanding and usage herein-after specified. 51

VI. Referring to Article VI of the bill of complaint, the defendant avers that it has no knowledge nor infor-

53 mation sufficient to form a belief as to the truth of any allegation therein contained; and it leaves the complainant to make such proof thereof as it may be advised.

VII. Referring to Article VII of the bill of complaint, the defendant denies that, at the time of taking possession of the securities therein mentioned, the defendant had any cause to believe that it was intended by the transfer thereof to the defendant to give the defendant a preference ; but, on the contrary, the defendant avers that the said loans and the receipt of the said securities were part of a continuous transaction, to be concluded on the day when the loans were made, and that the other creditors of the said Lathrop, Haskins & Company were fully cognizant of the general usage which governed transactions of that kind and were in nowise injured by the said transaction ; because, for the purpose of conducting their business in the usual manner, the said Lathrop, Haskins &

54 Company received from the defendant the full equivalent of the said securities, so that the fund available to other creditors was in no manner depleted, but was augmented as the result of the said transaction with the defendant.

VIII. Referring to Article VIII of the bill of complaint, the defendant denies each and every allegation therein contained.

56 IX. Referring to Article IX of the bill of complaint, the defendant avers that it has no knowledge nor information sufficient to form a belief as to the truth of any allegation therein contained; and it leaves the complainant to make such proof thereof as it may be advised.

X. Referring to Article X of the bill of complaint, the defendant denies each and every allegation therein contained.

XI. Further answering the bill of complaint, the defendant avers that, at the times therein specified, the said firm of Lathrop, Haskins & Company were engaged in the business of stock brokers, in the City of New York, and that Henry S. Haskins, one of the members thereof, was a member of the New York Stock Exchange ; that on January 19, 1910, the said firm applied to the defendant for a loan to meet its current obligations and to enable it to perform its existing contracts for the receipt of stocks for which it was to pay on that day and for the delivery of stocks deliverable on that day, which were pledged as security for loans previously obtained at other banks ; and if the said firm had been unable to obtain such loan, it would have been totally unable to perform its existing contracts and meet its current obligations ; and the value of its assets would have been greatly impaired. It was understood and agreed between the defendant and the said firm, at the time of making the said loan on January 19, 1910, and was in accordance with the general usage which had long prevailed in the transaction of such business between the defendant and the said firm, and between banks in the City of New York and Stock Exchange brokers, a usage which was well known to all persons doing business with the said firm, including their existing creditors, that loans thus made should either be paid off, during the day out of the proceeds of securities which were deliverable by the borrowers on the same day, or in the event of payment not being made in full, the remainder of such loan should be secured, before the close of business on the same day, by securities obtained by the said firm with the proceeds of such loan ; and the securities referred to in the bill of complaint were delivered to the defendant, pursuant to said understanding and agreement and the said general usage before the close of business on January 19, 1910, and the existing assets of the said firm in possession of the complainant, exclusive of the securities which were delivered to the defendant on January 19, 1910, are greater than they would have

**61** been if the defendant had not made the said loan and received the said securities.

**XII.** The defendant admits to this Honorable Court that all and every the matters in the complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a Court of Equity; and the defendant prays the same advantage of his aforesaid answer as if **62** he had pleaded or demurred to the bill of complaint; and the defendant humbly prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

New York, July 5, 1910.

SHEARMAN & STERLING,  
Solicitors for the National City Bank  
of New York

JOHN A. GARVER,  
of Counsel.

**63**

---

COUNTY OF NEW YORK :

**HORACE M. KILBORN**, being duly sworn, says that he is one of the Vice-Presidents of the National City Bank of New York, the defendant named in the foregoing answer, which is a domestic corporation, and that the **64** said answer is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that, as to those matters he believes it to be true.

HORACE M. KILBORN.

Sworn to before me, }  
July 5, 1910. }

O. R. HOUSTON,  
(SEAL) Notary Public,  
New York County.

**Replication.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee in  
 Bankruptey of Henry S. Haskins,  
 Henry Leverich, individually, and  
 Fannie G. Lathrop, Special partner  
 and as co-partners trading under  
 the firm name of Lathrop, Haskins  
 & Company,

Complainant,

AGAINST

NATIONAL CITY BANK OF NEW YORK,  
 Defendant.

This replicant, Henry D. Hotchkiss, as trustee, saving and reserving to himself all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, The National City Bank of New York, for replication thereunto saith that he doth and will ever, maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this replicant, without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true, all of which matters and things this replicant is ready to aver, maintain and prove as this

69 honorable court shall directly and humbly pray as in  
and by his said bill he hath already prayed.

ABRAM I. ELKUS and  
WM. S. MCGUIRE,  
Solicitors for complainant.

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70 CITY AND COUNTY OF NEW YORK, ss :

HENRY D. HOTCHKISS, being duly sworn, says that  
he is Trustee complainant in this action; that he has  
read the foregoing replication and knows the contents  
thereof; that the same is true to his own knowledge  
except as to matters therein stated to be alleged on  
information and belief, and as to those matters, he be-  
lieves it to be true.

HENRY D. HOTCHKISS.

Sworn to before me this 11th }  
71 day of July, 1910. }

WALTER H. MERRITT,  
Notary Public,  
New York County.

**Order of Reference.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee in  
Bankruptcy of Lathrop, Haskins  
& Co.,

Plaintiff,

AGAINST

NATIONAL CITY BANK,  
Defendant.

The above entitled action having duly come on to trial, and the defendant having thereupon moved to refer the same to a special master to hear, take testimony and report his opinion thereon upon the ground that the trial of the issues would involve an extended accounting to determine the insolvency of the bankrupt firm,

Now, upon motion of Shearman & Sterling, attorneys for the defendant, it is

Ordered, that the said motion be, and it hereby is granted, and that this cause be, and the same hereby is referred to Charles F. Brown, Esq., as special master, to hear, take testimony and report his opinion to this Court upon the express condition that the defendant bear and pay all expenses of the said reference, including master's charges, stenographer's fees and the copy of the minutes to be furnished to the complainant, and the amount so paid shall not be taxable as a cost or disbursement herein, and the said hearings before the master shall proceed from day to day without adjournment or postponement, except for good cause shown.

Dated, New York, October 31, 1910.

GEO. C. HOLT,  
*U. S. D. J.*

77

**DISTRICT COURT OF THE UNITED STATES,**  
**SOUTHERN DISTRICT OF NEW YORK.**

78

HENRY D. HOTCHKISS, as Trustee in  
 Bankruptcy, of Henry S. Haskins,  
 Henry Leverich, individually, and  
 Fannie G. Lathrop, special partner,  
 and as copartners trading  
 under the firm name of Lathrop  
 Haskins & Company.

AGAINST

THE NATIONAL CITY BANK.

NEW YORK, 31 October, 1910.

79

Before : Hon. CHARLES F. BROWN, Referee.

Appearances :

MESSRS. JAMES, SCHELL & ELKUS (Mr. ELKUS  
 and Mr. MCGUIRE of counsel), for Henry D.  
 Hotchkiss, as Trustee, &c. ;

MESSRS. SHEARMAN & STERLING (Mr. GARVER of  
 counsel) for the defendant.

The oath of the Referee is waived.

80 The first allegation of the complaint is conceded to  
 be true, subject to the right of defendant's counsel to  
 show that it is incorrect.

It is admitted that the second allegation of the com-  
 plaint is true, subject to the right of defendant's coun-  
 sel to show that it is incorrect.

It is admitted that the third allegation of the com-  
 plaint is true, subject to the right of defendant's coun-  
 sel to show that it is incorrect.

The fourth allegation of the complaint is admitted  
 subject to the qualification contained in the answer to  
 defendant's rights to receive such securities.

As to the fifth allegation of the complaint it is admitted that the securities were received and that defendant had a right to receive them, and that they were received as security; but defendant denies that the loans and advances were pretended, and claims that they were actual.

It is admitted that the National City Bank is a corporation duly created by and existing under the laws of the United States, and having its place of business at No. 55 Wall Street, in the City of New York.

81

Adjourned without date.

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82

NEW YORK, 26 January, 1911.

Present : THE REFEREE ;

MR. ELKUS for the complainant ;

MR. GARVER for the defendant.

After a discussion of the facts that may be conceded, it is agreed to adjourn the reference to Thursday, February 2nd, 1911, at 10.30 A. M.

83

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NEW YORK March 1, 1911.

Met pursuant to agreement.

Appearances :

THE REFEREE :

MR. ELKUS and Mr. McGuire for the com-  
plainant ;

84

MR. GARVER for the defendant.

ALEXANDER GILCHRIST, being duly sworn and examined as a witness for the complainant, testifies as follows :

By MR. ELKUS :

Q. Are you connected with the United States District Court Clerk's office ? A. For the Southern District of New York I am.

85

Q. In what capacity? A. Deputy clerk.

Q. Was a petition, creditor's petition against Lathrop, Haskins & Company filed with you personally, or did you receive it? A. I did.

Q. (Handing witness paper). Is this the petition? A. That is one of them, yes; one taken from the files.

Q. When was that filed with you? A. January 19th, 1910, at 4.10 P. M.

86

MR. ELKUS: I offer it in evidence.

It is marked Complainant's Exhibit 1 of March 1, 1911, and is as follows:

"TO THE HONORABLE , JUDGE  
OF THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK:

87 The petition of H. C. G. Barnaby, of Crescent Athletic Club, Borough of Brooklyn, City of New York, and of H. P. Clark, of 211 West 101st St., Borough of Manhattan, City of New York, and Alexander Melchers, of 428 Pacific Street, Brooklyn, respectfully shows:

That Henry Stanley Haskins, of 362 Warwick Ave., South Orange, New Jersey, and Henry L. Leverich, of Westchester, New York, and Fannie Graves Lathrop, of Hotel Buckingham, Borough of Manhattan, City of New York, as special partner, doing business as a copartnership under the firm name of Lathrop, Haskins & Company, of 60 Broadway, Borough of Manhattan, have for the greater portion of six months next preceding the date of filing this petition had their principal place of business at 60 Broadway, Borough of Manhattan, in the County of New York, and State and District aforesaid and owe debts to the amount of \$1,000.

That your petitioners are creditors of said Henry Stanley Haskins, Henry L. Leverich and Fannie Graves Lathrop, copartners as aforesaid, having provable claims amounting in the aggregate in excess of securities held by them to the sum of \$500. That the

nature and amount of your petitioner's claims are as 89  
follows :

Balance due on stock accounts :

H. C. G. Barnaby-----	\$2,000
H. P. Clark-----	200
Alexander Melcher-----	14,000

And your petitioners further represent that said Henry Stanley Haskins, Henry L. Leverich and Fannie Graves Lathrop, copartners as aforesaid, are insolvent and that within four months next preceding the date of this petition the said Henry Stanley Haskins, Henry L. Leverich and Fannie Graves Lathrop, copartners as aforesaid, committed an act of bankrupttey in that they did heretofore, to wit, on the 19th day of January, 1910, they acknowledged in writing that they and each of them were insolvent and willing to be declared bankrupt on that ground. 90

WHEREFORE your petitioners pray that the service of this petition with a subpoena may be made upon Henry Stanley Haskins, Henry L. Leverich and the firm of Lathrop, Haskins & Co. as provided in the acts of Congress relating to bankrupttey and that they may be adjudged by the Court to be bankrupt within the purview of said acts. 91

ALEXANDER MELCHERS,  
H. P. CLARK,  
H. C. G. BARNABY,

Petitioners. 92

MASTEN & NICHOLS,

Attorneys,

49 Wall St.,

New York City.

UNITED STATES OF AMERICA, }  
District of New York, } ss.:

HARRY P. CLARK, H. C. G. BARNABY and ALEXANDER MELCHERS, being three of the petitioners above named,

93 do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them are true.

Subscribed and sworn to before me }  
this 19th day of January, 1910. }

WALTER H. MERRITT,  
Notary Public,  
New York County."

94

Q. (Handing witness paper). You marked this at the time it was filed and handed it back to the person who presented it ? A. Yes.

The duplicate original above referred to is marked the same as the original, Complainant's Exhibit 1.

95 Q. Do you produce also the schedule of assets and liabilities filed by Lathrop, Haskins & Company in the same matter ? A. I do.

Q. When were they filed ? A. April 4th, 1910. The cover is gone, but I took it from the docket in the office, the date of the filing marked in my own handwriting "filed April 4th, 1910." I discovered this morning the cover had been ripped off.

MR. ELKUS : I offer those in evidence.

96 MR. GARVER : Objected to as irrelevant and incompetent and hearsay, if they are offered for the purpose of showing the insolvent condition of the partnership on January 19th, 1910.

THE REFEREE : I will overrule the objection.  
Exception.

The original and duplicate original are marked Plaintiff's Exhibit 2 of March 1st, 1911, a summary of which is as follows :

## SUMMARY OF DEBTS AND ASSETS.

(From the statements of the bankrupt in Schedules A. &amp; B.).

Schedule A 1 (1)	Taxes and debts due United States.....	None	
Schedule A 1 (2)	Taxes due States, counties, districts and municipalities.....	None	
Schedule A 1 (3)	Wages .....	332.23	98
Schedule A 1 (4)	Other debts preferred by law.....	None	
Schedule A 2	Secured claims.....	2,030,717.95	
Schedule A 3	Unsecured claims...	1,624,301.69	
Schedule A 4	Notes and bills which ought to be paid by other parties thereto.....		99
Schedule A 5	Accommodation paper .....	None	
	Schedule A, total.....	3,655,351.87	
Schedule B 1	Real Estate.....	None	
Schedule B 2-a	Cash on hand.....	None	
" " 2-b	Bills, promissory notes and securi- ties .....		100
Schedule B 2-c	Stock in trade.....	None	
" " 2-d	Household goods, &c.	None	
" " 2-e	Books, prints, and pictures .....	None	
Schedule B 2-f	Horses, cows and other animals .....	None	
Schedule B 2-g	Carriages and other vehicles .....	None	

<b>101</b>	Schedule B 2-h	Farming stock and implements-----	None
	Schedule B 2-i	Shipping and shares in vessels-----	None
	Schedule B 2-k	Machinery, tools, &c.	None
	" " 2-l	Patents, copyrights, and trade-marks...	None
	Schedule B 2-m	Other personal property -----	500.00
<b>102</b>	Schedule B 3-a	Debts due on open accounts .....	362,332.19
	Schedule B 3-b	Stocks, negotiable bonds, &c.-----	1,718,949.67
	Schedule B 3-e	Policies of insurance-----	None
	" " 3-d	Unliquidated claims-----	None
	" " 3-e	Deposits of money in banks and elsewhere	36,583.80
<b>103</b>	Schedule B 4	Property in reversion, remainder, trust, &c.-----	None
	Schedule B 5	Property claimed to be excepted-----	None
	Schedule B 6	Books, deeds and papers -----	None
	Schedule B, total.....		2,637,230.50
<b>104</b>	H. S. LEVERICH, HENRY STANLEY HASKINS.		

MR. ELKUS: If your Honor please, I want to explain some things that may happen. We presented to our adversaries in accordance with negotiations with them, a statement made by Mr. Lucas from our books showing the financial condition of Lathrop Haskins & Company, that is, showing their assets and liabilities at 2.15 P. M. on January 19th, 1910, it being claimed by us the securities were delivered after that

time on that date; that is the date of the suspension, and the date of the filing of the petition. The National City Bank employed an expert to examine our books and check off these figures and found them, as I understand, to be accurate.

MR. GARVER: I would rather not make that statement. We did not go into a minute examination.

MR. ELKUS: Strike that out then, and simply say that you appointed an expert to examine our books and they were examined by the expert.

I offer in evidence this statement from the books, of the assets of Lathrop Haskins & Company as of the 19th of January, 1910, at 2:15 P. M. on that day, due from customers.

MR. GARVER: I think perhaps it would be better to let Mr. Lucas testify.

EUGENE S. LUCAS, being duly sworn and examined 107 as a witness for the plaintiff, testified as follows:

BY MR. ELKUS:

Q. Were you employed by Lathrop, Haskins & Company prior to their failure? A. Yes.

Q. What was your position with them? A. Bookkeeper.

Q. How long have you been a bookkeeper? A. About 12 years.

Q. Did you keep the books of Lathrop, Haskins & Company? A. Yes.

Q. What books did you keep? A. I kept their ledger.

Q. Were you familiar with their affairs? A. Yes.

Q. How long had you been in their employ? A. 16 years.

Q. Did you make up for me a statement of the assets and liabilities of Lathrop, Haskins & Company as of January 19th, 1910, at 2:15 o'clock in the afternoon of that day? A. Yes.

109 Q. Was the statement you made up accurate ?  
A. Yes.

Q. Did it correctly show the assets and liabilities at that time ? A. Yes.

Q. According to the books ? A. Yes.

Q. How much did you find to be due from customers as shown by the books ? A. \$706,618.10.

Q. How much did you find to be due from members of the New York Stock Exchange who were so-called subscribers to the pool ? A. \$66,390.16.

110 Q. How much did you find to be due from members of the New York Stock Exchange on other transactions ? A. \$2,190.30.

Q. What was the value of securities on hand ?

MR. GARVER: Objected to on the ground that the witness is not shown to be an expert competent to value the securities, and that the proper method of ascertaining the value is to give a list of the securities, and then have it determined in the proper way what their value was at the time in question.

THE REFEREE: I think you had better withdraw the question.

MR. ELKUS: I will withdraw the question and put it this way.

Q. Did you make a list of the securities that were on hand at that time ? A. Yes.

112 Q. I show you a paper and ask you if this list was made by you and whether it is a correct statement of the securities on hand ? A. Yes.

BY THE REFEREE:

Q. You are speaking of 2.15 ?

BY MR. ELKUS:

Q. The first column ? A. The first column.

MR. GARVER: This all refers to the time 2.15 P. M. on January 19th, 1910 ?

THE WITNESS: Yes.

Q. I notice on that list that there are certain valua- 113 tions placed opposite each security ; did you place those valuations there ? A. Yes.

Q. Where did you get them from ? A. From the market price.

BY THE REFEREE :

Q. Market lists ? A. Yes.

BY MR. ELKUS :

114

Q. What did you look at to get them ?

A. On the Stock Exchange I had the regular Stock Exchange lists, and on the unlisted I used the Evening Sun of January 19th, 1910.

Q. The listed ones which were on the Stock Exchange you took the actual sales ? A. Regular Stock Exchange list.

Q. The list of sales made on the Stock Exchange at that time on that day ? A. Yes.

Q. And the others purported to be sales made of 115 securities that were not listed, by brokers and others, and the prices quoted ? A. Prices quoted, yes.

Q. You say you were sixteen years with Lathrop, Haskins & Company ? A. Yes.

Q. Were you familiar with the market value of securities by reason of your connection with them ? A. Yes.

Q. Can you tell whether or not the values which you have placed opposite those securities are the fair market value of those securities at that time ?

116

MR. GARVER : Objected to, as the witness is not shown to be competent.

THE REFEREE : You will have to show more than that ; there is a great mass of securities.

Q. Were those securities which were dealt in by Lathrop, Haskins & Company during the time you were connected with them—did they buy and sell them ; those securities or similar ones ? A. Yes.

**117 BY THE REFEREE :**

Q. Your knowledge came from what you heard other people say ; you didn't make any sales yourself, did you ? A. No, I didn't make any sales ; I recorded the transactions.

**THE REFEREE :** It was a good deal like reading in the Stock Exchange list ; some one of the firm reported they had made a sale ; perhaps it is all right, but I think—

**118 MR. ELKUS :** I don't say it is the best evidence, but I understood you verified all these figures.

**MR. GARVER :** Not as to values, we have not.

**MR. ELKUS :** I will offer in evidence the securities and valuations for what they are worth at the present time, with the promise to supplement it by competent proof.

**119 THE REFEREE :** It goes in evidence as a list of securities and the prices which were obtained for what they are worth.

**MR. GARVER :** And I object to it on the same ground, except that no objection is made on the ground that the securities dealt in on the Stock Exchange were not quoted at those values at 2:15 P. M. on that day.

**THE REFEREE :** I will take it.

Exception.

It is marked Plaintiff's Exhibit 3 of March 1, 1911.

**120** It is as follows :

**SECURITIES ON HAND.**

9M	Hoek Coal & Iron 5's .....	6,300
10M	Virginia def. certificates.....	4,900
1M	U. S. Steel Sinking Funds 5's .....	1,040
1M	Chie., R. I. & Pac. 5's .....	1,020
25	Mo. Kans. Texas Com. ....	1,100
60	Green Bay & West.....	5,100
12	U. S. Steel Pfd. ....	1,464
1200	Lanston Monotype.....	24,000
15	Am. Tel. & Tel. ....	2,040

20	Rock Island Com.	820	<b>121</b>
10	Wabash Pfd.	480	
10	Do. Com.	210	
5	Va. Car. Chem.	260	
25	Am. Beet Sugar Com.	1,050	
20	Allis Chalmers Pfd.	980	
10	Wheeling & Lake Erie II Pfd.	70	
25	Union Pac. Com.	4,750	
2610	Hock Coal & Iron Com.	83,520	
300	Lead Red.		
500	Montreal & Boston		<b>122</b>
25	Alaska Tel. & Tel.		
820	Council City & Solomon Riv.		
3M	Do. 6's		
4015	Virginia def. (1882)		
100	Ohio Tonopah		
63813.40	Hock C. & I. Syn. Cfs.		
50	Columbian Bk. Note Co.		
100	Old Hundred Mng.		
100	Stewart Mng.		
79	Hock C. & I. Pfd.		<b>123</b>
100	Cent. Foundry Pfd.	1,000	
100	Batopolas Mng.	300	
100	Union Copper Mines		
1200	Seattle Coal & Iron		
100	Gray Telautograph	1,000	
1M	Green River Coal & Coke I cfs.		
100	Seaboard Pfd.	3,500	
10	Am. Dist. Tel. Co.	120	
317/30400	N. J. Zinc Beneficial cfs.	200	
7M	Jersey Cty Hob. & Pat. 4's.	5,460	<b>124</b>
60	Chie. Term Com.	120	
10	Granby Cons.	1,100	
50	U. S. Red. & Ref. Com.	400	
1M	Mo. Pac. 5's	1,020	
125	Hudson & Man. Com.	2,750	
25	Chicago Subway	100	
34	Chic. & Gt. West. Com.	1,054	
24	Chic. & Gt. West. Pfd.	1,440	
3M	Seaboard 5's	2,160	
		160,828	

**125** Q. On the 19th of January, 1910, there were certain securities which, according to your books, had been delivered to the National City Bank? A. Yes.

Q. And have you a list of those securities? A. Yes.

Q. On the same paper? A. Yes, same sheet.

Q. Is that a correct statement of the securities delivered to them? A. Yes, the second column on that paper.

**126** MR. ELKUS: It is the same as Exhibit A. The values of those securities I think we have agreed upon.

MR. GARVER: We, of course, hold the securities.

MR. ELKUS: You have not sold them?

MR. GARVER: No.

Q. Were those all listed securities on the Exchange? A. They are all dealt in on the Exchange.

**127** Q. Did you place values on them? A. Yes.

Q. Where did you get your values? A. From the Stock Exchange lists.

Q. Of transactions on the Exchange that day? A. Yes.

Q. What was the value, total, the Stock Exchange value? A. \$154,300.

Q. Have you got the totals of that? A. The list of securities?

Q. Yes. A. Yes.

**128**

MR. GARVER: Was that 2.15 P. M.?

THE WITNESS: Yes, at that time.

Q. You mean the value at 2.15? A. Yes.

MR. ELKUS: I offer first the list of the securities which is part of the complaint and is admitted, and then simply for the purpose of giving information as to the value of the securities which were delivered to the National City Bank, I offer the valuation.

MR. GARVER : Objected to on the ground that 129 it is not proper evidence of the value at the time in question.

THE REFEREE : I will admit it as a statement of the Stock Exchange prices at 2.15.

The second column on the page is marked Plaintiff's Exhibit 4 of March 1, 1911.

A copy of the second column is as follows :

290 Sou. Pac.	129	25,800
200 Reading Com.	79½	15,900
100 N. Y. Cent. & Hudson	117	11,700
300 Rock Island Com.	41	12,300
100 Consol. Gas.	146	14,600
100 Smelting & Ref. Com.	92	9,200
200 Hoek Co. Iron Com.	32	6,400
300 Mo. Kans. Tex. Com.	44	13,200
100 Wabash com.	21	2,100
250 Anaconda	50	12,500
100 Texas Pac.	32	3,200
100 Kan. Cty. Sou. Com.	39	3,900
100 Nat'l Lead Com.	84	8,400
50 U. S. Steel Com.	82	4,100
10 Union Pac. Conv. 4 S.	1,100	11,000
		154,300

As to the first column they are the same as Exhibit A.

Q. Did you have any office furniture on hand ? A.  
Yes.

132

Q. How was that carried on the books, at a certain sum, or did you value it ? A. I valued it ; it was not carried on the books.

Q. What information or knowledge have you of the value of office furniture ; have you bought or sold it ? A. We bought most of that furniture ; we were only there for six months in that office, and we bought most of the furniture when we moved in there.

Q. Were you familiar with the buying of it ? A.  
Yes.

133 Q. And what was paid for it? A. Yes.

MR. GARVER: There won't be any trouble about that.

Q. How much did you pay for the office furniture on hand on January 19th, 1910? A. \$952.25.

Q. Was that a reasonable value of it? A. Yes.

Q. Was there any money due to Lathrop, Haskins & Company, or owing to Lathrop, Haskins & Company 134 which they had loaned to other firms or corporations, and if so how much? A. \$63,834.84.

Q. How much petty cash was on hand? A. \$131.66.

Q. How much was there due from banks and trust companies? A. \$99,600.

Q. Was there a membership in the New York Stock Exchange? A. Yes.

MR. ELKUS: Will you concede the value of that at \$75,000?

135 MR. GARVER: Yes.

THE REFEREE: Did that belong to the firm?

MR. ELKUS: One of the members of the firm.

It is conceded that \$75,000 was the reasonable fair market value of the seat on the New York Stock Exchange.

Q. That makes the total, according to you, of the assets of how much? A. \$1,329,875.31.

136 MR. GARVER: Objected to on the same ground, as calling for a conclusion.

Objection overruled.

Exception.

Q. In the amounts due from customers which you said you placed at \$706,618, you have a detailed list of all those customers have you, with the amounts due from each one? A. Yes.

MR. ELKUS: I offer that list in evidence.

Q. That is a correct statement? A. Yes.

137

The above list is marked Plaintiff's Exhibit 5  
of March 1, 1911.

The list is as follows:

DUE FROM CUSTOMERS.

Louis Breslauer inc. Pool.....	\$3,629.05
C. F. Willard.....	6,482.16 <b>138</b>
John Smith & E. S. Lucas.....	13,210.45
Berthold Levi inc. Pool.....	198,175.16
Alex. Melehers & H. C. G. Barnaby.....	417.57
E. B. Gethin & H. O. Seixas.....	227.95
H. O. Seixas inc. Pool.....	17,696.37
Jas. R. Keene inc. Pool.....	62,817.68
E. J. Garvan inc. Pool.....	9,643.62
H. B. Davis.....	5.05
Mrs. Allela L. Dunn inc. Pool.....	6,774.18
E. S. Lucas inc. Pool.....	8,376.50 <b>139</b>
O. B. Smith.....	15,030.12
Rohde & Haskins Co.....	19,896.27
H. C. Haskins.....	1,693.63
Col. & Hoek Clay Cons. Co.....	229,060.41
Col. & Hoek Oil & Gas Co.....	22,414.65
C. C. Cheney.....	6,226.37
Chas. Mindeleff.....	1,236.12
B. M. Rosenbaum .....	53.14
Harry Inman .....	3,847.18
Miss Harriet A. Stoll .....	591.57 <b>140</b>
Albert Vander Veer .....	962.34
Mrs. Vera Lavergne .....	4,808.08
Allan Abbott .....	10.63
J. F. Alexander .....	8,470.40
Geo. G. Ball .....	65.15
L. Bernheimer Trustee.....	3,355.37
Annie E. Crawford .....	323.66
F. M. Cronise No. 2 a/c .....	7,955.27
M. L. Eisemann.....	14,757.88
F. A. Guild.....	109.50

<b>141</b>	Wallace Irwin.....	1,011.78
	Mrs. Evelyn B. MacConnell.....	306.47
	Mrs. Carrie H. Midgley .....	4,024.52
	Wm. Ransom .....	83.79
	Wm. Rohde.....	824.06
	Max Staegeman .....	3,687.13
	C. W. Ray.....	117.08
	Col. Hoek Coal & Iron Co. Expense a/c.....	216.77
	J. W. Murphy .....	175.00
	W. G. Nicholas.....	352.08
<b>142</b>	C. F. Ackerman .....	3,816.24
	Herman Weiss .....	868.00
	Mrs. J. B. Bruyn Pool No. 1.....	2,851.46
	W. C. Curtis " " 1.....	2,851.46
	W. F. Osborne " " 1.....	14,257.32
	Oliver Gildersleeve .....	2,851.46
		<hr/>
		\$706,618.10

Q. In your occupation as bookkeeper of Lathrop,  
**143** Haskins & Company you were familiar with these  
accounts, were you? A. Yes.

Q. Take the account of Allela L. Dunn \$6,774.18; who  
was Allela L. Dunn? A. She is the wife of our  
former cashier.

Q. How was that account made up; what is it for?  
A. It was a regular trading account.

Q. Showing a loss on the account? A. Yes.

Q. How old is the account; when had the indebted-  
ness been incurred? A. It started in 1907, I think.

**144** Q. And ended? A. January 19th, 1910.

Q. Do you know whether Allela L. Dunn has any  
property or money of any kind? A. Not that I  
know of.

Q. Has she any business?

MR. GARVER: Do you know anything about it  
personally, have you personal knowledge on the  
subject?

A. I have met the lady twice, I think.

BY MR. GARVER :

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Q. You don't know personally what property she has? A. Well, no.

MR. GARVER: I move to strike out the answer of the witness.

THE REFEREE: Strike it out.

BY MR. ELKUS:

Q. Has she any business? A. No.

Q. Did you ask her to pay the amount? A. A 146 statement was sent to her.

Q. Did she pay it to the Trustee or Receiver?  
A. No.

Q. E. S. Lucas, is that yourself? A. Yes.

Q. You apparently owe \$8,376.50? A. Yes.

Q. Have you any property or money with which to pay this? A. No.

Q. You are employed by the Receiver or Trustee?  
A. Yes.

Q. And receive a salary? A. Yes.

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Q. Is that all you have, this salary? A. Yes.

Q. O. B. Smith, \$15,030.12; who was O. B. Smith?

A. He was a former partner of Mr. Lathrop.

Q. What business is he in? A. I don't think he has any business now.

Q. He apparently owes \$15,030.12. Have you asked him to pay this amount to the Trustee? A. He told me he could not pay it.

Q. Col. & Hock. Clay Cons. Co. \$114,530.21; that is moneys which were laid out for, or loaned to the Columbus & Hocking Clay Construction Co. by Lathrop, Haskins & Company, or is that half the amount?  
A. That is half the amount.

Q. They laid out how much? A. \$229,000—odd.

Q. What do you know about that; do you know anything about it at all of your own knowledge? A. We have deposited our claim with the Bankers Trust Company against the Hocking Coal & Iron Company, and I don't know whether the claim has been allowed or not; if it is we will get 50%.

**149** Q. Who told you that ?

MR. GARVER : Objected to, and I move to strike out "we will get 50%."

MR. ELKUS : Yes.

Q. Have you any knowledge of what the assets of the Columbus & Hocking Company are ? A. No.

Q. You don't know ? A. No.

**150** Q. Have you been informed as to what dividend will be paid ? A. No.

Q. Vera Lavergne \$4,808.08 ; do you know who that is ? A. It is a woman.

Q. Do you know her ? A. She is the wife of one of our former customers ; and a statement was sent to her and she has not paid anything on it.

Q. How old is the account ? A. The account was only about two months old, that is at that time.

Q. Is that a balance on speculations ? A. A balance on losses.

**151** Q. Do you know whether she is in any business ? A. I don't know.

Q. J. F. Alexander, \$8,470.40 ; how long has that sum been due from Mr. Alexander to Lathrop Haskins ? A. That has been due for ten years, I have here.

Q. Nothing has been paid on account of it for ten years ? A. Nothing has been paid—I don't think so.

Q. The books do not show any such payment ? A. No.

**152** Q. Do you know who J. F. Alexander is ? A. I know him, yes.

Q. What business is he in ? A. I understand he is a promoter.

Q. Is that a business ? A. I don't know.

Q. Have you asked him to pay this since a trustee has been appointed ? A. A statement was sent to him.

Q. Nothing has been paid ? A. Nothing has been paid.

Q. L. Bernheimer, Trustee, \$3,355.37. Do you know 153  
Mr. Bernheimer, Trustee? A. I did know him.

Q. The amount which you have there is the amount  
due according to the books from him to Lathrop,  
Haskins & Company? A. Yes.

Q. How long has that amount been due and unpaid?  
A. About eight years.

Q. Nothing has been paid according to the books  
for eight years? A. No.

Q. Do you know whether or not Mr. Bernheimer  
disputes that he owes this amount? A. I think he 154  
does.

Q. What business is he in? A. I don't think he is  
in any business.

Q. Do you know anything about his financial ability  
to pay it? A. No.

Q. F. M. Cronise \$7,955.27, No. 2 account; do you  
know him? A. He was a former partner of Lathrop  
& Smith.

Q. According to your statement he owes Lathrop  
Haskins \$7,955.27? A. Yes. 155

Q. What is his business now? A. He is connected  
with a brokerage house down the street.

Q. An employee? A. Yes.

Q. How long has this been due and unpaid? A. I  
think it has been due for three years; 1907—

Q. From 1907 is four years? A. To 1910.

Q. I mean to date? A. Four years.

Q. Nothing has been paid on it? A. No.

Q. Do you know anything about whether he is work-  
ing on a salary, or what? A. No, I don't know. 156

Q. M. L. Eisemann \$14,757.88, do you know him?  
A. I did know him.

Q. According to your books he owes \$14,757.88?  
A. Yes.

Q. How long, according to your books, has he owed  
that money and not paid it? A. Five or six years.

Q. Does he dispute the bill and refuse to pay it?  
A. Yes.

Q. On what ground, if you know? A. On the  
ground we were not justified in selling out his account.

**157** Q. You sold out his securities and he claims you had no right to do it, and refuses to pay the amount ?  
A. Yes.

Q. Has any suit ever been brought against him ?  
A. I don't think so.

Q. Wallace Irwin \$1,011.78, do you know him ? A. No.

Q. Do you know how long that amount has been due and unpaid, \$1,011.78 ? A. About three years.

**158** Q. Carrie H. Midgley account, \$4,024.52, according to your books it appears that amount is due ? A. Yes.

Q. Did Lathrop, Haskins & Company sell out the account, and is that the balance which they claim from her ? A. Yes.

Q. When did they sell out that account ? A. That would be about six years ago.

Q. Did she dispute the amount ? A. Yes.

Q. Does she dispute it ? A. Yes.

**159** Q. Do you know whether she brought a suit against Lathrop, Haskins & Company for damages because of their alleged wrongful act in selling her out ? A. Yes.

Q. That suit is still pending as far as you know ? A. Yes.

Q. William Rohde \$824.06, do you know him ? A. Yes.

Q. How long has this amount been owing, if you know ? A. That has been owing about a year.

Q. Has he paid it, or does he refuse to pay it ? A. I don't think—

**160** Q. Do you know anything about his financial ability to pay ? A. I don't think he can pay it.

Q. What does he do ? A. He is treasurer of Rohde & Haskins Company, books and stationery.

Q. Max Staegeman, you say he owes Lathrop, Haskins & Company \$3,687.13 ; have you any security for that ? A. We have got some pictures.

Q. Oil paintings ? A. Oil paintings.

Q. Where are they ? A. They are in a storage company.

Q. Do you know Mr. Staegeman ? A. I did know him.

Q. What business is he in, if any? A. I think he 161 runs a hotel in New City.

Q. Do you know anything of the value of those pictures? A. He claims—

MR. GARVER: I object to what he claims.

Q. Do you know? A. I don't know.

Q. Oliver Gildersleeve \$2,851.46? A. Yes.

Q. Do you know Mr. Gildersleeve? A. Yes.

Q. Is he in business? A. I think he is—I am not 162 sure; I think he is.

Q. Do you know whether Mr. Gildersleeve has refused to pay this claim? A. I don't know.

Q. Just look at your memorandum which you gave me? A. Yes, he has disputed the claim.

Q. He says he does not owe it? A. He says he does not owe it.

Q. Do you know whether he has filed a claim against the Estate with the Trustee or with the Referee in Bankruptcy? A. Yes, he has filed a claim with the 163 Referee for \$1,000.

Q. \$1,000 damages? A. That is the amount of money he put in.

Q. Does he claim he was sold out improperly? A. No.

Q. He disputes the claim? A. Yes.

Q. And the amounts of money loaned which you put in your statement, how much was loaned to the Hocking Coal & Iron Company, \$58,164.84? A. Yes.

Q. How much of that can be collected, you don't 164 know? A. No.

Q. Among the customers' accounts there is a claim against—you have included a claim against James R. Keene \$62,817.68? A. Yes.

Q. He is disputing that? A. Yes.

Q. You have included a claim against Berthold Levi for \$198,175.16? A. Yes.

MR. ELKUS: I may state here if you will take my word, that suit has been brought upon that

165 claim and Mr. Levi disputes it on a great many grounds ; the action is now on the calendar awaiting trial ; may that be taken as a statement of fact ?

MR. GARVER : Yes.

Q. You have a claim here against Louis Breslauer \$3,629.05 ? A. Yes.

Q. Does M<sup>r</sup>. Breslauer refuse to pay that ? A. Yes.

166 Q. And a claim against C. T. Willard of \$6,482.16 ; does he refuse to pay that ? A. He disputes it.

Q. Do you know Mr. Willard ? A. Yes.

Q. What business is he in ? A. Dealer in bricks.

Q. You have also included a claim against H. O. Seixas \$17,696.37 ? A. Yes.

Q. Has he refused to pay that ? A. He says he can't.

Q. You have also included a claim against E. J. Garvan for \$9,643.62 ? A. Yes,

167 Q. What is his first name ? A. Edward.

Q. Edward J. Garvan ? A. Yes.

Q. Mr. Garvan was a lawyer living in Hartford, Connecticut ? A. Yes.

Q. And he has died since the filing of the petition in bankruptcy here ? A. Yes.

Q. Do you know whether he left any assets ? A. I couldn't say.

Q. Do you know Harry Inman ? A. Yes.

168 Q. Who is Mr. Harry Inman ; what is his business ; where is he employed ? A. I don't know what his business is ; I have known him from coming in the office.

Q. According to your books he owes \$3,847.18 to Lathrop, Haskins & Company ? A. Yes.

Q. Has he refused to pay it ? A. I don't know ; I didn't hear from him.

Q. Do you know Herman Weiss ? A. Yes.

Q. He owes, according to your books, \$868 ? A. Yes.

Q. Has he declined to pay that amount ? A. Yes.

Q. He says he doesn't owe it? A. He says he 169  
doesn't owe it.

Q. Do you know C. F. Ackerman? A. Yes.

Q. According to your books he owes \$3,816.24? A.  
Yes.

Q. Has he refused to pay that amount—how old a  
claim is it? A. That is right on the top, January  
19th.

Q. Do you know anything about his ability to pay  
it? A. I don't know anything about his financial  
responsibility. 170

Q. Mrs. J. B. Bruyn \$2,851.46; does she refuse to  
pay it? A. She disputes it.

Q. W. C. Curtis \$2,851.46; does he dispute it?  
A. The same thing.

Q. How about W. F. Osborne \$14,257.32? A. That  
is disputed too.

Q. According to your books on January 19th, 1910,  
how much was due by Lathrop, Haskins & Company  
to customers of theirs? A. \$747,361.50.

Q. Have you a detailed list of those amounts due 171  
the various customers? A. Yes.

Q. (Handing witness paper.) I show you a paper  
consisting of two sheets, and ask you if this is a cor-  
rect statement of the amounts due by Lathrop, Has-  
kins & Company to their customers on January 19th,  
1910, at 2:15 P. M., the names and amounts, other  
than members of the New York Stock Exchange? A.  
Yes.

The above list is offered in evidence and 172  
marked Plaintiff's Exhibit 6 of March 1, 1911.

It is as follows:

DUE TO CUSTOMERS.

Miss Carrie Strauss.....	828.30
Mrs. Alice Alexander.....	1,279.81
R. M. Bell.....	2,805.38
Carroll Berry.....	1,206.86
G. S. Boehm in Pool.....	1,115.95

173	T. S. Darling	-----	6,863.98
	Estate of Ellery Denison	-----	25,088.85
	Chas. B. Dunlap	-----	516.25
	D. L. Evans No. 2	4,319.77	
		1,667.23	5,987.
	John Feldhusen	-----	15,974.29
	Robt. Flanagan	-----	4,542.36
	Mrs. Cecelia Flanagan	-----	1,917.11
	Miss Harriet C. Green	-----	736.93
	Miss Ottolie Gessner	-----	10,039.67
174	Chas. F. Green in Pool	-----	27,383.40
	Green Bros.	-----	4,631.09
	Thos. E. Hicks	-----	1,374.32
	F. F. Kleemann	-----	3,126.11
	Robt. G. Lassiter	-----	1,787.93
	W. G. Lauer	-----	597.33
	Miss Catherine Leverich	-----	2,671.17
	Edw. Martin	-----	1,429.57
	Mrs. Sarah Martin	-----	11,616.14
	Alex. Melchers inc. Pool	-----	3,381.62
175	Emma G. Osborn	-----	24,998.91
	Y. Pendas	-----	8,573.72
	H. O. Seixas & Est. of L. C. Lathrop	-----	859.36
	F. M. Sharpe	-----	1,444.67
	Harry Strang	-----	5,111.04
	H. M. Taylor	-----	2,125.22
	Mrs. Genevieve A. Vedder	-----	5,442.96
	Do.	No. 2	489.65
	C. P. Vedder	-----	16,850.73
	C. D. Strang	-----	1,949.78
176	H. C. G. Barnaby No. 2	-----	2,070.98
	Annie F. Leverich in Pool	-----	7,143.11
	H. S. Wade	-----	1,844.87
	Annie F. Leverich Trustee %	-----	18,647.66
	E. C. Lunt	-----	845.36
	Guilermo Lavergne	-----	35.76
	F. W. Finley	-----	2,230.84
	Jas. S. Braden	-----	4,799.77
	Mrs. Harriet Clark	-----	55.75
	Rene Cluzelle	-----	3,511.72
	Mrs. Susan C. Davey	-----	804.53

R. J. Farmer .....	500.00	<b>177</b>
W. L. Jacques, Jr. ....	543.76	
F. J. Kretzer.....	437.02	
Mrs. Charlotte M. Baird .....	1,075.77	
Nina J. White .....	2,119.55	
Anne C. Phyfe .....	506.33	
Estate of Robt. J. Gray .....	828.30	
Chas. H. Boylhart .....	74.05	
H. P. Clark .....	183.34	
Mrs. W. F. Kelley .....	7,896.28	
Miss Maude A. Haskins .....	3,717.03	<b>178</b>
Mrs. Marian L. Haskins .....	2,892.31	
L. L. Haskins .....	157.95	
L. S. Haskins .....	1,203.02	
Col. Hoek. C. & I. Syndicate .....	49,547.08	
Annie F. Leverich No. 2 .....	50,000.	
Estate of R. R. Graves .....	663.17	
Do. in Trust for Mrs. Lathrop .....	18,388.77	
Mrs. Fannie G. Lathrop .....	2,001.01	
Estate of L. C. Lathrop .....	41,877.54	
Miss Florence G. Lathrop .....	16,521.36	<b>179</b>
Mrs. Emily H. Florence .....	682.45	
Herbert G. Greene .....	733.92	
W. F. Healy .....	3,664.92	
Jane L. Hill .....	10,131.54	
Mrs. Alice Kraft .....	1,106.27	
Mrs. Hortense Walker .....	900.20	
Mrs. Janet H. Little .....	67.61	
R. F. Little .....	216,908.13	
A. S. Niven .....	831.44	
E. H. Osborn .....	194.89	<b>180</b>
Mrs. Mary J. Simonson .....	1,201.32	
Ella M. Graves .....	7,157.50	
Thos. L. Culver .....	731.96	
Miss S. C. Burt .....	94.23	
Mrs. Katherine S. Morrison .....	192.65	
Mrs. Eliza Wolf .....	313.65	
Hy. Greenspan .....	647.04	
J. A. Fonda .....	5,645.51	
M. I. Newman .....	4,411.99	
R. L. Reid .....	266.02	

<b>181</b>	<b>Geo. T. Smith .....</b>	<b>115.12</b>
	C. H. Messmore.....	73.37
	N. L. C. Kachelmacher..... No. 2,695.04	
		663.73
		-----
	Mrs. Saide Newman .....	42.54
	D. E. Morrison.....	603.20
	Mrs. Maude E. Kimball.....	81.25
	R. A. Semon .....	405.37
	Chas. W. Johnson .....	1,443.75
<b>182</b>	<b>Thos. L. Jacques .....</b>	<b>393.75</b>
	J. W. Escher.....	1,287.
	F. W. Bellois .....	.62
	Max S. Boehm .....	20.52
	A. J. Thomas .....	1.51
	S. L. Wilson .....	.15
	F. S. Bosworth.....	501.25
	W. H. Quaw .....	33.33
	Mrs. Sarah Breslauer.....	3,437.57
	Mrs. Frances C. Harsen .....	599.78
<b>183</b>	<b>N. N. Morse .....</b>	<b>232.40</b>
	Andrew Miller.....	5,847.74
	H. Hentz & Co. .....	23,545.85
		-----
		747,361.50

Q. How much was due according to your books to members of the New York Stock Exchange by Lathrop, Haskins & Company at the same time? A. \$858, 813.95.

184 Q. I show you a paper and ask you if that is a correct statement of the names and amounts? A. Yes.

The above paper is offered in evidence and marked Plaintiff's Exhibit 7 of March 1, 1911.

It is as follows:

## DUE TO MEMBERS N. Y. STOCK EXCHANGE. 185

Roberts, Hall & Criss.....	517,258.51
A. J. Elias & Co.....	70,560.51
Rollins & Co.....	69,704.16
Day, Adams & Co.....	108,143.85
J. M. Fiske & Co. in Pool.....	57,458.31
Schuyler, Chadwick & Burnham.....	28,324.49
Geo. F. Secor Co. Lent Stock.....	5,800.

857,249.83 186

Warner & Co.....	58.24
Martin & Floyd.....	142.63
Herrick, Berg & Co.....	6.25
Wilcox & Co.....	47.50
I. H. Waggoner.....	235.
Homans & Co.....	10.
C. W. Turner & Co.....	10.
Rae H. Rogers.....	14.
W. T. Colbron.....	14.
Benj. Fleisher.....	20.
H. H. Cone.....	789.
F. W. Duryea & Co.....	9.50

858,605.95

Ira A. Kipp.....	10.
Rene A. De Russy.....	16.
J. H. Auerbach.....	166.
J. A. Dix.....	14.
Purdy & Co.....	2.

858,813.95 188

Q. How much was due to banks and trust companies at the same time? A. \$213,693.50.

Q. I show you a paper and ask if that is a correct statement of the banks and trust companies, and the amounts due to each one according to your books? A. Yes.

The above paper is offered in evidence, and marked Plaintiff's Exhibit 8 of March 1, 1911.

189 It is as follows :

DUE TO BANKS & TRUST COMPANIES.

	Metropolitan Trust Co.	13,290.
	Do.	39,960.
	Do.	6,126.
	Irving Natl. Ex. Bk. a/c L. Scheppe	19,800.
	Natl. Park Bank	13,000.
	First Natl. Bank	5,400.
190	Lincoln Trust Co.	1,900.
	Mercantile Trust & Dep. Co. of Balt.	2,750.
	Central Trust Co.	8,200.
	Do.	1,500.
	Do.	11,520.
	Do.	6,280.
	Bank of Montreal	10,355.
	Farmers Loan & Tr. Co.	9,200.
	Do.	5,700.
	Do.	10,900.
191	Market & Fulton Natl. Bnk.	10,100.
	Miss. Valley Tr. Co. a/c Standard Tr. Co.	6,950.
	Imp. & Traders Natl. Bk.	8,500.
	Guaranty Tr. Co.	3,462.50
	Do.	12,700.
	Natl. City Bank	6,100.
		213,693.50

Q. How much was owing to the National City Bank besides that, besides this amount ? A. \$116,166.69.

192 Q. That makes total liabilities of how much ? A. \$1,936,035.64.

Q. Showing excess of liabilities over assets of how much ?

MR. GARVER : Objected to on the same ground as heretofore stated, and asking a conclusion of the witness.

Objection overruled.

Exception.

A. \$606,160.33.

Q. That is, taking as due from customers—making 193 no deductions of any kind from the amounts which your books show as due from customers? A. No.

Q. Or making any other deductions from the gross totals—gross amounts? A. No.

MR. GARVER: I will defer the cross-examination of the present witness until after the examination of Mr. Martin.

194

HARRISON R. MARTIN, being duly sworn and examined as a witness for the plaintiff, testifies as follows:

BY MR. ELEKUS:

Q. Are you connected with the New York Stock Exchange? A. I am assistant secretary.

Q. Were you assistant secretary on the 19th of January, 1910? A. Yes.

Q. Have you with you a notice you received on that day from Lathrop, Haskins & Company, a letter or notice?

Witness produces paper.

Q. You have produced a paper dated January 19th 1910, from Lathrop, Haskins & Company to the Secretary of the New York Stock Exchange? A. Yes.

Q. Will you please tell me at what time on January 19th, 1910, that notice or letter was received by the Stock Exchange? A. 8 minutes after 12.

Q. Do you know whether or not any announcement was made on the floor of the Stock Exchange after the receipt of that notice?

MR. GARVER: Objected to as incompetent.

THE REFEREE: He may state if he knows.

A. I heard an announcement.

**197**      **MR. GARVER:** I think it is incompetent as to us.

**THE REFEREE:** If it is the fact he can state it.

**MR. ELKUS:** I will show they knew of it.

**THE REFEREE:** The legal effect of it we can decide hereafter, the fact that there was an announcement made he may testify to.

**Q.** What announcement did you hear made, and by whom and when? **A.** By R. H. Thomas, the president, who read from the rostrum this letter.

**MR. ELKUS:** I offer the letter in evidence.

**MR. GARVER:** Objected to as incompetent.

**THE REFEREE:** I will take it.

Exception.

The letter is marked Plaintiff's Exhibit 9 of March 1, 1911, and is as follows:

"Telephones 5192-5193-5194 Rector.

**199**      Henry Stanley Haskins, Henry S. Leverich

Member New York Stock Exchange

Fannie Graves Lathrop, Special Partner.

LATHROP, HASKINS & CO.

Bankers & Brokers

Cable Address "Lathrop, New York"

60 Broadway

NEW YORK, Jan. 19, 1910.

**200** SECRETARY OF THE N. Y. STOCK EXCHANGE,  
Broad Street, New York City.

DEAR SIR:

We regret to state that we are unable to meet our obligations.

Very truly yours,

LATHROP, HASKINS & CO.

12/08 PM

HSH/MYS Jan. 19, 1910

O K

R H Thomas B. G. T. 12:11 "

Q. Is there any rule of the—did you say what time 201  
that letter was read? A. It is marked here 12.11.

Q. The letter was received 12.11? A. Received  
12.08.

Q. And read at 12.11, that is 11 minutes past 12?  
A. Yes.

Q. How many brokers were present at the time it  
was read, or how many persons were present?

MR. GARVER: Objected to as irrelevant and  
incompetent.

202

THE REFEREE: He may state generally.  
Exception.

A. I couldn't tell.

Q. About, I don't ask the exact number? A. I  
couldn't venture to say.

Q. Were there a thousand persons within hearing of  
Mr. Thomas when he read it? A. I should say not.

Q. Five hundred?

203

Same objection.

A. I should say not.

Q. 250?

Same objection.

A. Yes, perhaps.

Q. Were they brokers and members of the Ex-  
change? A. Some.

Q. Connected with the Stock Exchange is a system 204  
by which all information, including such information  
as this, is sent out over what are called tickers to all  
the subscribers to it, is there not? A. That is not  
true, no.

Q. Isn't there a ticker system connected with the  
Stock Exchange?

MR. GARVER: Objected to.

A. Yes.

205 Q. Explain what that is.

MR. GARVER : Objected to.

THE REFEREE : Objection sustained.

MR. ELKUS : I am going to show that the National City Bank had a ticker, and this information went over that ticker and they got it within two minutes after it was announced.

206 THE REFEREE : I don't think that is competent; if you show they did get it by some one connected with the National City Bank that is different.

MR. ELKUS : I am going to show the vice-president of the National City Bank knew this was announced.

THE REFEREE : That will be all right, but I think I will sustain the objection to this.

MR. ELKUS : I except.

Q. Will you explain to the Referee the system by  
207 which all information announced of this kind on the floor of the Exchange is sent out over tickers, and along the ticker system to all subscribers to that system?

MR. GARVER : Objected to.

Objection sustained.

Exception.

208 MR. ELKUS : I offer this evidence for the purpose of showing that this particular notice of Lathrop, Haskins & Company's inability to pay their debts was sent out over the ticker and was communicated by that method and others to the National City Bank, and that the National City Bank officials within half an hour of the actual reading of the notice knew of the same and its contents, and I except to the ruling.

THE REFEREE : I will take any proof you offer to show the officers of the Bank had notice of the failure or notice of this announcement.

Q. What I want to know is did this notice go out on 209 the ticker?

MR. GARVER: Objected to.

THE REFEREE: I will take it.

Exception.

A. It did not, not on the Stock Exchange ticker.

Q. Did it go out on any other ticker? A. I can't be presumed to know.

Q. Don't you know? A. No.

MR. ELKUS: Will you make a copy of that 210 notice and send it to me?

THE WITNESS: Yes.

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ROBERT F. LITTLE, being duly sworn and examined as a witness for the plaintiff, testifies as follows:

BY MR. ELKUS:

Q. Were you in the office of Lathrop, Haskins & Company on the 19th of January, 1910? A. Yes.

Q. Did you meet Mr. Kilborn the vice-president of the National City Bank on that day? A. Yes.

Q. What is your profession? A. I am a lawyer.

Q. Were you the attorney for Lathrop, Haskins & Company? A. I was.

Q. And were you in their office that afternoon? A. All the afternoon.

Q. Were you present when the letter was written that has just been put in evidence, to the New York 212 Stock Exchange? A. I didn't hear that testimony.

Q. The secretary of the New York Stock Exchange, or assistant secretary, testified a letter had been received shortly after 12 o'clock on the morning of the 19th of January, 1910, from Lathrop, Haskins & Company announcing their inability to pay their debts, or meet their obligations; were you present at the time that letter was written? A. I was.

Q. Who wrote it? A. Mr. Haskins wrote it at my direction.

213 Q. At the same time do you know whether or not Mr. Haskins wrote a letter to the National City Bank ?  
A. He did.

Q. Did you see that letter ? A. I did.

Q. What time was it that Mr. Kilborn came in the office of Lathrop, Haskins & Company on the 19th of January, 1910 ?

A. Sometime between one and half past.

Q. Was any one with him ? A. Yes.

Q. Who, if you know ? A. I don't know his name,  
214 a grey haired gentleman.

Q. Did you see Mr. Kilborn as he came in, or had he been there talking with some one else before you saw him ? A. I heard him announced, and I saw him as soon as he came in.

Q. Who was present besides Mr. Kilborn, yourself and this gentleman who accompanied Mr. Kilborn ? A. Mr. Leverich.

Q. Was Mr. Haskins there ? A. Not at first.

Q. Tell the conversation, the substance of the conversation, you had with Mr. Kilborn ? A. Mr. Kilborn wanted money or securities to make up certifications of Lathrop Haskins.

Q. What did he say, if anything, with reference to Lathrop, Haskins & Company's financial condition ?

A. He said he had heard of the break in the stock and Lathrop Haskins' trouble, and he wanted payment of of the City Bank's obligations.

Q. What did you say ? A. I told him they were insolvent, and a petition was either filed or being filed  
216 against them.

Q. What kind of a petition ? A. A petition in bankruptcy, and they could not pay anybody. He told me it was a very serious matter and that they should pay ; that they were not like ordinary creditors.

Q. Who were not ? A. The City Bank, and he said it amounted to a conversion ; I told him I didn't agree with him on that, and they stayed there probably for two hours ; I talked with them myself every 10 or 15

minutes from that time until after the close of the 217 Exchange; they stayed in Mr. Haskins' private room.

Q. What, if anything, was said with reference to preference? A. I told them finally when I concluded to give them the securities that it was a preference, and that they could not be in a safer place than in the City Bank.

Q. Did you finally give them securities? A. Yes.

Q. What was said when you gave them the securities? A. I told them that was the reason I decided to give them to them, not that there was any fraud in 218 connection with it; I wanted them to distinctly understand that.

Q. What did you say, if anything, with reference to —was anything said about a settlement or resumption? A. I told them I hoped they would resume, and I wanted the relations between the City Bank and Lathrop Haskins as friendly as possible; that was the motive that inspired me in directing the return of the securities.

Q. What did you say—you said you said something 219 about a preference? A. I told him it was a clear preference.

Q. Did you explain what you meant by that? A. Preferring him over other creditors.

Q. Did you say anything about if they went into bankruptcy they would have to pay it back, or give them back? A. I don't remember saying that; I said the City Bank was the safest place for the securities, and whatever was right they would be properly taken care of.

220

Q. At that time were Lathrop, Haskins & Company in the hope of being able to resume? A. I always felt they would resume.

Q. Was anything said about the friendship of the National City Bank? A. No, I don't think so, except that they desired the good will of the National City Bank, and that they had been very old customers of the National City Bank.

Q. Did you tell him anything about the financial

221 condition of Lathrop, Haskins & Company? A. Yes, I went into everything very fully with him.

Q. What did you tell them? A. I explained the whole situation about the pool with Keene, and told him how much of a loss there would be in that regard.

Q. How much did you tell him there would be? A. About \$2,000,000.

Q. What else did you tell him? A. I went into the full details of the pool with him.

Q. Did you tell him Lathrop, Haskins & Company 222 would lose \$2,000,000? A. Yes, I did; I told him also I thought if the Stock Exchange would act quickly they could save a great portion of it.

Q. Did you say whether or not Lathrop Haskins were insolvent? A. There was no question about that; I told him they couldn't meet their obligations, and in paying him they were doing something they ought not to do; we debated that question for nearly two hours.

Q. What time was it you gave the securities? A. 223 After 3 o'clock.

#### CROSS-EXAMINATION BY MR. GARVER:

Q. Where did this conversation take place? A. In Mr. Haskins' private office.

Q. All of it? A. Yes.

Q. You were there continuously in that same room? A. That was my headquarters; I was there in and out all the afternoon.

224 Q. When did you go there that day? A. I was there all day, had been there all day.

Q. What time in the morning did you go there? A. I went there about half past nine or quarter of ten.

Q. You did not have any apprehension that morning of this failure? A. No; I was there every morning at that time.

Q. There was no intimation of a failure that morning, was there? A. Not the slightest.

Q. The business was going on just as usual even

after the Stock Exchange opened at 10 o'clock? A. 225  
Yes, just the same.

Q. When did you get the first intimation of this break in Hocking stock? A. About quarter of eleven.

Q. That was after Lathrop, Haskins & Company had got their day loan or clearance loan? A. I don't know anything about that; I don't know that at all.

Q. Who else was in that room with you? A. At what time?

Q. At the time Mr. Kilborn and his associates were there. A. Mr. Leverich was there off and on; I was 226 there off and on; a good many customers came through; I think Mr. Ames came in, of the Stock Exchange; Mr. Lucas, I think, came in and out; Miss Moore, Mr. Haskins' private secretary, came in and out; Mr. Pomeroy was in and out; Mr. Harry Dunn, assistant cashier, was in and out.

Q. Anybody else that you recall? A. I can't recall anybody else specifically.

Q. Wasn't Henry D. Hotchkiss there most of the time? A. No; he was there in the afternoon. 227

Q. Wasn't he there when Mr. Kilborn and his associate arrived? A. I think he was in the office; I don't think he saw Mr. Kilborn. I didn't see him see Mr. Kilborn.

Q. Don't you know Mr. Kilborn and his associate were in conference with Mr. Hotchkiss? A. I beg your pardon?

Q. Don't you know that during the time Mr. Kilborn and his associate were there that afternoon they were in conference with Mr. Henry D. Hotchkiss? A. 228 I didn't see them.

Q. You saw Mr. Hotchkiss there that day? A. Yes.

Q. At what time did you first see him? A. I think he came there about two hours and a half after the suspension was announced, or two hours.

Q. State the time? A. About half past two or quarter of three.

Q. Will you say he wasn't there when Mr. Kilborn and his associate arrived? A. He wasn't there.

229 Q. And he wasn't there you think until after half past two? A. He was there at half past two.

Q. Wasn't he there at two? A. He might have been there at two.

Q. Mr. Hotchkiss is a lawyer also? A. Yes.

Q. And is the Trustee in Bankruptcy of Lathrop, Haskins & Company? A. Yes.

Q. Did you confer with him at that time about the delivery of these securities? A. I did not.

Q. Not at all? A. No.

230 Q. Didn't say a word to him about it? A. No.

Q. He knew about the delivery at that time, didn't he?

MR. ELKUS: Objected to; how does he know; it calls for a conclusion.

A. I don't know.

Q. Do you know whether Mr. Hotchkiss was in conference with Mr. Haskins? A. I don't know.

231 Q. Did you see them talking together at all that day? A. I think I did.

Q. Mr. Haskins was the Stock Exchange member of the firm, was he not? A. Yes.

Q. And the active member of the firm? A. Yes.

Q. You stated that you thought if the Stock Exchange acted quickly Lathrop, Haskins & Company could resume; what did you mean by that? A. I meant they could get after Keene and force him to disgorge.

232 Q. In other words, if Mr. Keene did what you considered he should have done the failure could have been obviated? A. No.

MR. ELKUS: Objected to.

THE WITNESS: They would have been able to resume. All the creditors were friendly and I knew they would allow them to resume.

THE REFEREE: I will allow him to explain.

Q. Didn't Mr. Haskins immediately prepare a state-

ment for submission to the Stock Exchange, hoping 233 they would act favorably in his case ?

MR. ELKUS : Objected to.

THE REFEREE : He may answer.

A. I prepared myself several statements, but I don't remember them.

Q. What were those statements for, to show Lathrop, Haskins & Company were really solvent ? A. Indeed, no.

234

Q. To show they were able to continue business ?  
A. To show the cause of the losses.

Q. What was that ? A. Mr. Keene and the Hocking smash.

Q. Mr. Keene, according to Lathrop, Haskins & Company had not been done his duty as manager of the Hocking Pool, was that it ? A. That was part of it ; the main part of it.

Q. That he had betrayed the pool ? A. Yes.

Q. And that was the cause of the smash, was it ? 235  
A. The cause of the smash, yes.

Q. Do you know whether there is a suit pending now against Keene brought by the Trustee in Bankruptcy ? A. There is.

MR. ELKUS : Objected to as immaterial, irrelevant and incompetent.

THE REFEREE : Isn't that the suit you referred to ?

MR. ELKUS : I referred to a suit against 236 Berthold Levi.

THE REFEREE : I will let the answer stand.

Q. Do you know about that ?

MR. ELKUS : There isn't a suit against Keene ; it is an action for an accounting. It is not a suit for a particular sum against Keene.

Q. You stated on your direct examination that Mr. Kilborn said that Lathrop, Haskins & Company

237 ought to pay the balance due ; did he say why they ought to ? A. He stated to me this was very different from the ordinary obligation ; that it amounted to a conversion ; those were his words, I think.

Q. It was different from an ordinary obligation, wasn't it ?

MR. ELKUS : Objected to ; I don't want him to characterize.

238 A. I don't think it was.

Q. Was there any other obligation that day that was similar to this that you know of ? A. No, I don't think Lathrop Haskins had any notes out other than these.

Q. These are what is known in the street as day loans ? A. Demand notes.

Objected to, what is known in the street ; he didn't make the loan.

239 MR. GARVER : He was familiar with it.  
Objection sustained.

Q. Do you know when Mr. Hotchkiss left the office of Lathrop, Haskins & Company that afternoon ? A. Sometime between 3 and 4 ; I don't remember seeing him leave, but I believe then.

Q. You said you told Mr. Kilborn you hoped Lathrop, Haskins & Company would resume ? A. Yes.

Q. Why are you so clear that Mr. Kilborn and his 240 associate did not leave there until after 3 o'clock ? A. For a number of reasons ; first the ticker had stopped ticking when they finally left the office, and the tape was all torn out of the ticker and strewn about the floor, and not only that but the final price of Hocking had been received and I discussed it with Mr. Kilborn. That day made a wonderful impression on me ; my loss was enormous at the same time ; the Hocking episode is as clear to me as a bell.

Q. Were you personally speculating at that time ? A. Very heavily in Hocking.

Q. You did not anticipate this crash, did you? A. 241  
No, I did not.

Q. Even that morning? A. Not that morning until it started to break.

Q. You believed that Hocking stock was worth about what it had been quoted at for six months before?

MR. ELKUS: Objected to; he is not called for any such purpose as that.

Objection sustained.

Adjourned to Monday, March 6th, at 10.30 A. M. 242

NEW YORK, March 8, 1911.

Met pursuant to adjournment.

Appearances:

THE REFEREE; MR. ELKUS and MR. GARVER.

MR. ELKUS: I have a number of witnesses here who appear on the books as owing money to the firm of Lathrop, Haskins & Company, and whose accounts were included in the amounts due from customers. I will call these witnesses. 243

JOHN F. ALEXANDER, being duly sworn and examined as a witness for the complainant, testifies:

BY MR. ELKUS:

Q. Are you in any business? A. Yes, I am.

244

Q. What is your business? A. I have been interested in securities all my life, at least for a great many years. I am at the present time in the Telautograph Company.

Q. It appears by the books of Lathrop, Haskins & Company that you owe them \$8,470.40? A. Yes, of ten years' standing.

Q. Have you ever paid anything on account of that in the last ten years? A. I think once they asked me to put up a little money one day, and I did pay but a

**245** small amount of money, and I bought a little stock and they sold it out without my consent, so that it really didn't help the account any.

Q. Are you able financially to pay this money ? A. Oh, no, I couldn't do that.

Q. Have you any means to pay it with ? A. No, I haven't it.

CROSS-EXAMINED BY MR. GARVER :

**246** Q. Have you been a stock exchange broker ? A. Never.

Q. You have been dealing in securities in Wall Street for a great many years ? A. Oh, yes.

Q. Have you had your office here in Wall Street ? A. At 80 Broadway for years. Some day in the future I suppose I will have some money.

Q. You have never taken advantage of the Bankruptcy Law ? A. Oh, no.

**247** BY MR. ELKUS :

Q. Do you mean you have not then ? A. Well, I have debts and people have been willing to carry me along.

BY MR. GARVER :

Q. You have earning capacity ? A. I did until the panic, and then my business fell off to about one-tenth.

**248** Q. And you are trying to get on your feet again ? A. I am trying to adjust things.

Q. What was the origin of this account ? A. Since 20 years ago I was interested in selling securities and at one time had made a good deal of money ; until I bought a thousand shares of East Tennessee First Preferred at \$19 a share.

Q. It was a speculative account ? A. Yes, and the stock went down to \$3 a share. Then I suppose I have put up about half of it ; but it is hard to—

Q. It was carried a good many years ? A. Yes ; and then there were some other things ; then they

assessed the stock. I don't mean to say that some 249 day in the future I can't adjust everything; but I certainly haven't been able for ten years to do it.

HARRY DUNN, being duly sworn and examined as a witness for the plaintiff, testifies :

BY MR. ELKUS :

Q. Where do you live? A. 1535 58th Street, Brooklyn.

250

Q. What is your wife's name? A. Allela L. Dunn.

Q. What is your business? A. I am a loan broker.

Q. Do you know all about your wife's affairs, business affairs? A. I think I do.

MR. ELKUS : We subpoenaed Mrs. Dunn, and Mr. Dunn came instead; he said he would make a statement for her.

Q. Mrs. Dunn appears on the books of Lathrop, Haskins & Company as a debtor to them for \$6,774.18. 251 Is your wife able to pay that amount? A. She is not.

Q. She has no means? A. Absolutely none.

CROSS-EXAMINED BY MR. GARVER :

Q. What did that account represent? A. It was a speculative account.

Q. In what? A. Various stocks.

Q. Including the Columbus & Hocking Coal & Iron? A. Yes.

252

Q. Was that principally the basis of the account? A. Not entirely; it was—I have forgotten, but there was Southern Pacific, and Union Pacific at the time of the failure.

Q. How long had she had an account with them? A. Since April, 1909.

Q. And had you been managing it for her? A. I had authority to purchase and sell securities for her.

Q. And you did do that, did you? A. I did do that.

**253** Q. Where is your office? A. 15 Wall Street.

Q. You said you were a loan broker? A. I am in the employ of Luke, Bank & Weeks.

Q. Is that a Stock Exchange house? A. That is a Stock Exchange house.

Q. How long have you been with them? A. I went there October 31st of last year.

Q. And previous to that what had you been doing? A. I had been a loan broker on my own account.

**254** Q. What do you mean by that? A. Placing loans with stock exchange houses from the local banks.

MR. ELKUS: You are willing to take his statement instead of his wife's?

MR. GARVER: Yes, I shall not make any point about that.

FRANK M. CRONISE, being duly sworn and examined as a witness for the plaintiff, testifies:

**255** By MR. ELKUS:

Q. Where do you live? A. I am living in New York at the present time.

Q. What is your business? A. I have been a broker, and I am with Whitehouse & Company at 111 Broadway.

Q. Are you employed there? A. Yes.

**256** Q. You appear on the books of Lathrop, Haskins & Company as a debtor to them in the sum of \$7,955.27; is that correct? A. I presume it is, although that was made during the Lathrop & Smith regime. It is a very old account.

Q. Are you financially able to pay this sum? A. Absolutely not.

Q. Have you any means whatever with which to pay it? A. Not at all; I have a very small salary, and, owing to the breaking up of the old firm, it crippled me so that I was unable to make an arrangement whereby I would have been able to pay; but the account was never pressed and I never supposed it

would be. I was a partner of Mr. Lathrop at the 257 time.

Q. You were originally a partner of Lathrop? A. Yes.

Q. Years ago? A. Four years ago.

Q. Is this a balance of a partnership account, or a speculative account? A. It was a trading account.

CROSS-EXAMINED BY MR. GARVER:

Q. What do you mean by trading account? A. 258 Well, I suppose trading in stocks.

Q. Buying and selling on a margin? A. Yes; not on a margin; at least I had no margin; Mr. Lathrop allowed me to do that without margin; I was a partner.

Q. Did you have any capital in the firm? A. No, but I brought a very large business to the firm.

Q. You have been in the stock brokerage business for a good many years? A. Yes.

Q. You haven't taken any proceedings in Bank- 259 ruptcy, have you? A. Not at all.

BY MR. ELKUS:

Q. You said you had a very small salary and that is all you have? A. At present, yes; a very small salary.

MOSES L. EISEMANN, being duly sworn and examined as a witness for the plaintiff, testifies:

260

BY MR. ELKUS:

Q. Where do you live? A. New Rochelle.

Q. What is your business? A. Salesman.

Q. You are employed as a salesman, on a salary or commission? A. Commission.

Q. By whom are you employed? A. Smith, Eisemann & Co.

Q. According to the books of Lathrop, Haskins & Company you appear to be a debtor to them in the

261 sum of \$14,757.88. Do you owe them any money; is that sum correct? A. I have never done any business with that concern at all; it is the old concern.

Q. The concern that preceded them; what was their name? A. Lathrop, Smith & Company.

Q. Did you owe the firm of Lathrop, Smith & Company that money? A. I think they owed me, but I didn't want to spend the money as I didn't have it.

Q. According to my memorandum you dispute any claim they have against you, because you say they sold 262 you out without any authority? A. Yes. Not that alone; I had a certain agreement with Mr. Lathrop which is a secret at the present time; in case there is a suit brought I probably could make a claim.

Q. How long is it since you had these transactions with Lathrop, Haskins & Company? A. Oh, long before the new concern started.

Q. Is it more than six years ago? A. I should think so.

Q. That is your best recollection? A. I think so.

263 Q. If you ever owed them \$14,000 are you financially able to pay it? A. No; I guess there are several judgments out against me now.

Q. Unpaid? A. Unpaid.

Q. And you have no means? A. I have had to go back to work; the Street took all my money.

#### CROSS-EXAMINED BY MR. GARVER:

Q. Was this balance the result of a speculative account which you had with the old firm? A. Yes.

BERTHOLD LEVI, being duly sworn and examined as a witness for the plaintiff, testifies:

#### BY MR. ELKUS:

Q. Where do you reside and what is your business, and where is your place of business? A. I reside at 22 West 75th Street, and I am a merchant at 82 Pearl Street.

Q. The Trustee of Lathrop, Haskins & Company has brought two suits against you in the Supreme Court of the State of New York demanding judgment against you in those two suits for sums aggregating about \$250,000, and you have refused to pay those sums, have you? A. Yes.

Q. You claim that you don't owe them any money, don't you? A. The suit is in the courts now.

Q. I don't want to preclude your defense, but you deny owing them that sum of money, or any money? A. Yes.

266

## BY THE REFEREE :

Q. Do you deny owing them any money? A. Yes, sir.

## BY MR. ELKUS :

Q. If a judgment is recovered against you for the amount claimed, are you financially able to pay it? A. I hope so.

267

## CROSS-EXAMINED BY MR. GARVER :

Q. Aren't you in any business? A. Yes.

Q. What? A. Merchant; importer and exporter of sausage cases at 82 Pearl Street.

Q. Have you any partners? A. Yes.

Q. What is your firm? A. Berthold Levi & Company.

Q. How long has that firm been in existence? A. About 30 years.

Q. So you are solvent, aren't you; you meet your debts, don't you, that you acknowledge to be due? A. We have no debts.

Q. You have no debts, and you have property, haven't you? A. Yes.

268

269 VERA B. LAVERGNE, being duly sworn and examined as a witness for the plaintiff, testifies :

BY MR. ELKUS :

Q. Where do you live ? A. 47 West 52nd Street.

Q. Are you engaged in any business ? A. Absolutely none.

Q. According to the books of Lathrop, Haskins & Company you appear to owe them \$4,808.08 ; is that correct ? A. Well, I haven't looked at the paper for a long time, but I suppose it is.

Q. Have you any means with which to pay that debt ? A. None at all.

Q. You have no property of any kind ? A. No.

CROSS-EXAMINED BY MR. GARVER :

Q. Are you married ? A. Yes.

Q. Is that your residence, 47 West 52nd Street ? A. I just simply board there.

271 Q. Have you any occupation ? A. No.

Q. Have you any source of income ? A. No.

Q. How do you pay your board ? A. I have nothing excepting what my husband has given me.

Q. Your husband is living there ? A. No, he doesn't live there.

BY MR. ELKUS :

Q. How old are you now ? A. I was 21 last October.

272 Q. What day were you born, if you know ? A. October the 18th, 1889.

EUGENE S. LUCAS, recalled.

BY MR. ELKUS :

Q. When was the last transaction with Mrs. Lavergne on which this account is based ? A. Some-time in December, 1909.

HENRY PETERSEN, being duly sworn and examined 273 as a witness for the plaintiff, testifies :

BY MR. ELKUS :

Q. Where do you live? A. In Hoboken.

Q. What is your business now? A. I am a stenographer.

Q. Where are you employed? A. In the B. & O. Railroad, pier 22.

Q. Were you in the employ of Lathrop, Haskins & Company on the 19th day of January, 1910? A. Yes. 274

Q. Did you take any letter that day to the National City Bank? A. I did.

Q. Whereabouts; where did you take it? A. 55 Wall Street.

Q. Where did you leave it? A. I left it with the gentleman sitting at the left of the door.

Q. You went in the bank? A. I went in the main entrance to the Bank, and turned to the left and left the letter at one of the desks.

Q. Were there a number of people sitting at desks 275 there? A. Yes.

Q. And you gave it to one of these men? A. Yes.

Q. And he took it? A. Yes.

Q. What did this man do with it, if you know? A. This man opened the letter and read it, and took it off to somebody else.

Q. Did you see the contents of the letter? A. Yes, I read the letter over the man's shoulder; as he opened it I read it.

Q. You were very curious to know what was in it? 276 A. It was important to me to know what was in it, and I didn't think it was any harm.

Q. Do you know what time of day you delivered the letter? A. It was anywhere between the hours of half past eleven and half past twelve and close on to twelve.

Q. Was there a great deal of excitement in the office that day? A. Yes, just at that time there was.

Q. Do you remember whether that was the day of

**277** the collapse of the Hoeking Pool, or the panic? A. Yes, I do.

Q. That is the way you remember it? A. Yes.

Q. Who gave you the letter to deliver to the National City Bank? A. Mr. Haskins.

Q. Do you remember the contents of the letter? A. Yes.

Q. What were they, in substance, can you tell me?

A. Yes; the letter read "I regret to advise that I am forced to suspend. An assignee will be appointed".

**278** Q. Who was it signed by, if you know? A. I believe it was signed "Lathrop & Haskins".

Q. I show you a paper which purports to be a carbon copy of it, and ask you if that is a correct copy of the letter which you read over this man's shoulder? A. That is a correct copy, as I remember it.

The letter is offered in evidence.

MR. GARVER: I object on the ground that it does not appear to have reached any officer of the defendant.

Objection overruled.

Exception.

The letter is marked Plaintiff's Exhibit 9 of March 8, 1911, and is as follows:

"JANUARY 19TH, 1910.

NAT. CITY BANK OF NEW YORK,  
55 Wall Street,  
New York City.

**280**

GENTLEMEN :

We regret to state that we are forced to suspend.  
Assignee will be named later."

CROSS-EXAMINED BY MR. GARVER:

Q. What was your position with Lathrop, Haskins & Company? A. I was the assistant ticket clerk; assistant comparison clerk, or ticket clerk.

Q. You said you looked over the shoulder of this

gentlemen because you were interested; why were you personally interested? A. Because it was rumored around the office, as I left the office, that the firm had failed; and I imagined that that letter would say if they had failed or not.

Q. When you entered the City Bank you turned to the desk to the left and immediately inside the door? A. When I went in I asked one of the attendants in uniform—I showed him the letter and asked to whom it was addressed, and he directed me to a gentleman sitting at the desk, to whom I delivered it.

Q. To whom was this letter addressed? A. I don't recall to whom it was addressed.

Q. You recall distinctly the contents of the letter, but you don't recall to whom it was addressed? A. Yes.

Q. That is so, is it? A. Yes.

Q. You don't know whether it reached the gentleman to whom it was addressed or not, do you? A. Well, I don't know if the gentleman to whom I delivered it was the gentleman to whom it was addressed.

Q. Might this have been sometime between 12:30 and 1 o'clock that you got there? A. Well, I don't think it could; it wasn't as late as 12:30.

Q. Did you look at any clock when you got there? A. No, I don't recall looking at any clock, but I can just about imagine though it was between half past eleven and half past twelve.

Q. You are trusting to your imagination, are you? A. I am trusting to imagination and I can recall certain people that I saw on the street when I brought the note back to the office.

Q. What note did you bring back to the office? A. I mean coming back from bringing the note.

Q. Did you take any note back to the office? A. No, I didn't receive any reply at all.

Q. Did you ask if there was a reply? A. I didn't ask them, no.

Q. You didn't wait at all? A. I waited till the gen-

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285 tleman came back and he told me all right, but he didn't give me a reply.

RE-DIRECT EXAMINATION BY MR. ELKUS :

Q. Do you know whether or not this letter was addressed to any person or was it only addressed to the National City Bank ? A. I believe the letter was addressed to a certain person.

Q. But you don't know whom ? A. No, I do not.

286 Q. You were told by Mr. Haskins what to do with the letter ? A. I was told to deliver it to the person to whom it was addressed.

Q. And you went to the National City Bank ? A. Yes.

MR. ELKUS : Mr. Garver, will you make a concession about the values of the stocks and bonds ; the assets ?

287 MR. GARVER : Yes. Mr. Lucas having testified to the assets and liabilities of Lathrop, Haskins & Company as of 2:15 P. M. January 19th, 1910, and the assets having included securities on hand and with the National City Bank, the defendant concedes that the securities, insofar as they were listed on the New York Stock Exchange, were valued at the market quotation which prevailed at 2:15 P. M. on that date, and that the securities which were not listed were reasonably worth the valuations placed upon them by Mr. Lucas.

288 MR. ELKUS : Will you concede that the values as appears by the Stock Exchange quotations were the reasonable values—

MR. GARVER : No, I won't concede that. I see by referring to Plaintiff's Exhibit 3 that 79 shares of the preferred stock of the Hocking Coal & Iron Company are stated to be worthless. They certainly had some value because Mr. Lucas, I think, valued the common stock at about 32.

EUGENE S. LUCAS resumes the stand.

289

BY MR. ELKUS:

Q. Mr. Lucas, in your opinion and knowing what you do about Columbus & Hocking stock, the 79 shares of preferred stock are not worth more and were not worth more on January 19th than \$5,000, were they? A. No.

Q. Did you know O. B. Smith? A. Yes.

Q. He appears on the books of Lathrop, Haskins & Company to be indebted to them in the sum of 290 \$15,030.12? A. Yes.

Q. He was a partner of Lathrop, Smith & Company? A. Yes.

Q. He had no capital in the business? A. No.

Q. What does he do now? A. Nothing that I know of.

Q. Has he any means of any kind? A. Not that I know of.

Q. There is one account E. J. Garvan in pool, which refers to the sum of \$9,643.62; what did that represent? A. It represented his own account and his pool account. 291

Q. His own account was secured, was it not? A. It was partly secured.

Q. His own account was \$32,296.30, according to the statement? A. The debit balance?

Q. Yes; and against that he had 10 shares of United States Rubber First Preferred, and 20 of Second Preferred, and 200 of Consolidated Gas? A. Yes. 292

Q. Do you know Mrs. Carrie H. Midgley. A. No, I knew her husband; he was in the insurance business, the last I heard of him, but he hasn't been in business in quite a few years.

Q. Has he got any means? A. I don't think so; we have got a suit on; she is suing us for damages for selling her out.

Q. Suing Lathrop, Haskins & Company? A. Yes, that suit is pending.

293 Q. How old is the suit? A. That account accrued in 1905 or 1906.

MR. ELKUS: That is for \$4,024.52. Will you make any arrangement as to that?

Mr. GARVER: Is that a debit balance, dating back?

THE WITNESS: Yes.

MR. ELKUS: If we do not hear from you to the contrary it may be considered dead?

294 MR. GARVER: I guess so.

CROSS-EXAMINED BY MR. GARVER:

Q. You have prepared a balance sheet showing the assets and liabilities of the firm of Lathrop, Haskins & Company at 10 o'clock in the forenoon of January 19, 1910, have you not? A. Yes.

Q. Is this the balance sheet which I show you? A. Yes.

Q. Does that correctly represent their financial condition at 10 o'clock in the morning of that day? A. Yes.

The balance sheet is offered in evidence.

Objected to as incompetent, irrelevant and immaterial.

THE REFEREE: I will take it.

Exception.

It is marked Defendant's Exhibit A of this date, and is as follows:

297

## BALANCE SHEET AT 10 A. M. JANUARY 19, 1910.

*As Prepared by Mr. Lucas.**Assets :*

Cash .....	\$12,358.24
Due from Customers fully secured.....	3,804,589.63
Due from Customers part secured, good..	648,348.94
Due from Customers, bad .....	17,131.04
Miscellaneous Accounts Receivable not secured, good .....	298 117,394.22
Miscellaneous Accounts Receivable not secured, bad .....	45,035.43
Money lent .....	63,864.84
Stock Exchange Membership .....	75,000.00
	<hr/>
	\$4,783,722.34

*Liabilities :*

Due to Customers .....	\$160,092.29 299
Due to Syndicates .....	99,860.48
Money borrowed .....	4,019,000.00
Stocks loaned .....	17,900.00
Partners Capital (Inc. Stock Exchange seat) .....	326,083.33
Profit & Loss .....	160,786.24
	<hr/>
	\$4,783,722.34

MR. ELKUS : I will offer in evidence the summary of this witness's direct examination as to the assets and liabilities of Lathrop, Haskins & Company at 2.15 P. M. January 19th, 1910.

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It is marked Plaintiff's Exhibit 10 of this date, and is as follows :

**301** Statement of Financial condition as shown on books at 2.15.

(Note Hocking Stock at 32 bonds at 50)

Due from Customers.....	706,618.10
Due from members N. Y. Stock Exchange	
Pool Subscribers .....	66,390.16
Due from members N. Y. Stock Exchange	
(Other trans) .....	2,190.30
Securities on hand.....	160,828.00
Securities with National City Bank.....	154,300.00
<b>302</b> Office furniture.....	952.25
Money loaned.....	63,864.84
Petty Cash.....	131.66
Due from banks and trust Co's.....	99,600.00
Membership N. Y. Stock Exchange.....	75,000.00
	-----
	\$1,329,875.31

*Liabilities*

Due to customers.....	747,361.50
Due to members N. Y. Stock Exchange.....	858,813.95
<b>303</b> Due to Banks and Trust Co's.....	213,693.50
National City Bank.....	116,166.69
	-----
	\$1,936,035.64
Excess of liabilities over assets, as shown on books.....	\$606,160.33

**304** Q. According to this balance sheet Exhibit A the assets exceeded the liabilities at 10 o'clock on the morning of January 19th by \$486,869.57; is that correct as shown by the balance sheet? A. Yes.

Q. This sum comprises the item that you have included here in liabilities in "Partners Capital" \$326,083.33, and "Profit and Loss" \$160,786.24? A. Yes, that is right.

Q. Then according to the condition as shown at the opening of business on January 19th, 1910, there was no intimation of insolvency at that time, according to the books?

Objected to as immaterial and irrelevant and calling for the witness's conclusion. 305

THE REFEREE: He may state whether there was anything that was threatening.

Q. As far as you know?

Same objection, ruling and exception.

A. Not as far as I know.

Q. Will you state what brought about the difference in conditions as shown by the balance sheet at 10 o'clock in the morning and the balance sheet at 2.15 in the afternoon? 306

Objected to as incompetent, irrelevant and immaterial and calling for this witness's conclusion, and not facts.

Objection overruled.

Exception.

A. The drop in the price of stocks more than anything else. 307

Q. What stock? A. Hocking Coal & Iron.

Q. When did that drop first begin to take place that day, if you know?

Same objection ruling and exception.

A. I don't know. I wasn't at the ticker all day.

Q. But you had charge of the books and were recording the transactions, and knew generally of the business of the firm, did you not? A. I did; but I didn't receive the transactions as soon as they were made. 308

Q. When did you first hear of any drop in the price of this stock, Hocking Coal & Iron? A. I imagine that probably somebody came in from some of the other offices, and told me that the stock was breaking.

Q. Can you recall about when? A. No, I haven't any idea.

309 Q. Was it an hour after business opened ? A. I couldn't say.

Q. It was sometime after the opening of business ? A. Oh, yes ; I could say that it wasn't for half an hour after the opening.

Q. And it may have been more than half an hour after the opening ? A. It probably was.

Q. The Stock Exchange is open from 10 to 3 o'clock, isn't it ? A. From 10 to 3, yes.

Q. After the Hocking stock commenced to break 310 that day, it continued to decline for a couple of hours, did it not, down to 2:15 ? A. Yes ; I don't know just exactly the time that the drop stopped, but since I have been figuring on these prices I find that it started to rally around 2:15 ; it had been down to 25 and then later it was 32½ and it closed at 33.

Q. And that is the price that you took in estimating the value of the stock at 2:15 ? A. I took 32.

Q. You made a careful examination of the Stock Exchange prices affecting these various securities on 311 that day, did you not ; you took the Stock Exchange list ? A. I took the Stock Exchange list, yes.

Q. And that is the way you got your valuations ? A. Yes.

Q. From the Stock Exchange lists ? A. Yes.

Q. Did the break in the Hocking stock carry down the general market that day ?

Objected to as a conclusion.

312 THE REFEREE : He may tell whether stocks fell.

A. Some did ; Consolidated Gas went down 8 points ; that was about the second biggest break.

Q. And the other securities that you have valued as of 2:15, were they all selling at a lower price than at the opening ? A. I should imagine so.

Q. Do you recall any instance where that was not the case ? A. No, I haven't looked into that at all ; I don't know.

Q. There were other failures of Stock Exchange 313 houses that day, were there not?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Exception.

A. One more.

Q. What was that? A. J. M. Fiske & Company.

Q. Was that a Stock Exchange house? A. Yes. 314

BY THE REFEREE :

Q. By a Stock Exchange house you mean where one of the partners is a member of the Stock Exchange?

A. Member of the Exchange, yes.

BY MR. GARVER :

Q. How about the firm of Roberts, Hall & Criss?

Same objection, ruling and exception.

315

A. Criss—I don't know whether he failed that day or the next day; I am not sure.

Q. What is your best recollection? A. I think it was announced the next day.

Q. That was a Stock Exchange house too, was it? A. Yes; Criss was Board member and Roberts and Hall were Cincinnati people.

Q. I wish you would refer to Plaintiff's Exhibit 3, being the securities on hand at 2:15 P. M. on that day, 316 and state what securities on that list were listed on the Stock Exchange? A. I will tell you as much as I know. For instance Amalgamated Copper isn't listed, but it is dealt in on the Exchange. Anaconda isn't listed, but that also is dealt in on the Exchange. Lead isn't listed—

Q. Then I will confine my question to the securities that are dealt in on the Stock Exchange and that appear on the Stock Exchange list at quotations to

317 which you have referred. A. There are two lists ; one dealt in and the other not dealt in.

Q. Then I will ask you to designate in Plaintiff's Exhibit 3 the securities that are set forth there at the valuations which you obtained from the New York Stock Exchange list of quotations issued on that day ; what I want to find out is which of these securities you valued, relying upon this list of quotations on that day ? A. Virginia deferred certificates ; U. S. Steel Sinking Fund 5s ; Chicago, Rock Island & Pacific collateral 5s ; Missouri, Kansas & Texas common ; U. S. Steel preferred ; American Telephone & Telegraph ; Rock Island common ; Wabash preferred ; Wabash common ; Virginia, Carolina Chemical ; American Beet Sugar common ; Allis Chalmers pfd ; Wheeling & Lake Erie 2nd pfd ; Union Pacific common ; Hocking Coal & Iron common ; Chicago Terminal common ; Missouri Pacific 5s, at 19 and 20 ; Chicago & Great Western common ; Chicago & Great Western pfd ; Seaboard Adjustment 5s.

318 319 Q. All of the securities specified in Plaintiff's Exhibit 4, being those received by the City Bank, are listed, are they not, or is there any exception ? A. The Anaconda is in the unlisted department, but dealt in on the Stock Exchange.

Q. And that was actively dealt in ? A. Yes.

Q. And these are the quotations on that day at that time ? A. Yes.

Q. Plaintiff's Exhibit 5 "Amounts due from Customers," Plaintiff's Exhibit 6 "Amount due to Customers;" what do you mean by the term "Customers"? A. Those are people who had accounts with us, or money on deposit.

Q. Referring to Exhibit 6 "Amount due to Customers"; can you specify which represent deposits and which represent amounts due for trading accounts ? A. Most of these are the results of stock transactions.

Q. Will you indicate the exceptions, please ? A. Here is Henry Hentz & Company, this last one right down at the bottom ; that is the result of unpaid

checks ; checks that we gave to them and the banks 321 hadn't paid.

Q. On January 18th you drew checks and delivered them to them and then those checks didn't go through ?  
A. Those checks didn't go through.

Q. Is that the only exception that you notice ? A. Well, here is that one of Andrew Miller ; that is the same way ; an unpaid check. The rest of them are the results of stock transactions.

Q. That is, they were buying and selling stocks through Lathrop, Haskins & Company as brokers ? 322  
A. Yes.

Q. And were most of those accounts, accounts of some standing ? A. Yes ; the majority of them were all good.

Q. I mean they had been dealing through Lathrop, Haskins & Company for some time, had they ? A. Yes.

Q. These balances were arbitrary so far as January 19th, 1910, is concerned, were they not ; you merely estimated these balances, did you not, taking the valuation of the securities on that day ? A. Taking the valuation of the securities at that time.

Q. As a matter of fact the accounts had not been closed ? A. Not at 2.15.

Q. Take for instance the second item ; Mrs. Alice Alexander \$1,279.81 ; isn't it a fact that at 2.15, so far as the books showed, she was indebted to Lathrop, Haskins & Company for \$4,889.19 ? A. That was a debit balance.

Q. That was a debit balance due from her, wasn't it ? 324  
A. That was a debit balance due from her, and we had her securities ; she might have been sold out at any time.

Q. And you estimated the value of the securities at 2.15 P. M., and then you deducted from the value thus ascertained this debit balance of \$4,489.19, leaving her in credit \$1,279.81 ? A. Yes.

Q. And is that the way you reached the balances in the case of each one of these customers ; the amount

325 due to the customers ? A. In all of them, the amount due from customers.

Q. I notice in Plaintiff's Exhibits 5 and 6, the amounts due from customers and the amounts due to customers, the words "in pool" added after various names ? A. That should be "including pool."

Q. What do you mean by pool accounts ? A. These different people subscribed to the pool ; of course they all had a loss ; the Hocking Coal & Iron pool, all the pool ended up in a loss ; they 326 subscribed to Lathrop, Haskins & Company's proportion of the pool.

Q. Just state the facts. A. Lathrop, Haskins & Company subscribed to a certain amount of stock in the Hocking pool.

Q. Who were the other members of that pool ? A. There were seven or eight stock exchange houses.

Q. Can you mention them ? A. Yes ; J. M. Fiske & Company ; Post & Flagg ; Orvis Brothers ; Day, Adams & Company ; Jewett Brothers ; Newburger, 327 Henderson & Loeb ; A. J. Elias & Company ; Markoe & Morrison ; Lathrop, Haskins & Company ; James R. Keene ; I think that is all.

Q. And when was that pool formed ? A. That was formed March 1, 1909 ; it was to run for six months, and it expired September 1st, 1909, at which time Orvis Brothers, Post & Flagg, drew out, and Day, Adams & Company withdrew part of their subscription ; reducing the pool by those three withdrawals. The pool was then renewed for six months more ; and that would 328 bring it up to March 1st, 1910, and that was how it stood at the time of the failure. There was also a second pool in the same stock, which was started in August, 1909 ; that pool was composed of Atwood, Violett & Company ; Bishop, Leimbeer & Company ; VanSchaick & Company ; J. M. Fiske & Company ; Lathrop, Haskins & Company ; James R. Keene ; Tucker, Anthony & Company ; Wagner, Dickerson & Company ; I think that completes the No. 2 pool.

Q. Who was the manager of those pools ? A. Mr. Keene.

Q. What participation did Lathrop, Haskins & Company have in each pool ? A. In the No. 1 pool the par value of the pool was 20,000 shares ; that is, that was the par ; Lathrop, Haskins & Company had subscriptions, directly subscribed for 5,000 and two other brokers for 5,500, making 10,500 in all of the No. 1 pool ; of the No. 2 pool Lathrop, Haskins & Company subscribed for 2,000 shares out of twenty ; par value both the same.

Q. Do you know what Mr. James R. Keene's interest was in each pool ?

330

MR. ELKUS : I do not want to be committed by Mr. Lucas's testimony as to papers that are in writing ; nor as to his conclusion as to the legal effect of documents and obligations. I move to strike out what the witness has said about pools expiring by limitation unless it is expressly understood that he is testifying as to his impression ; that he has no real knowledge, but only hearsay.

331

Q. You have seen these agreements, have you not ?

A. Yes, I have seen them.

Q. And you knew the transactions that had been based on them, didn't you, from your knowledge of the books so far as Lathrop, Haskins & Company's participation ?

Objected to.

THE REFEREE : So far as Lathrop, Haskins & Company are concerned, he may state.

Exception.

A. Well, I know what I put down in the books, of course.

Q. And that is the foundation of the testimony you have been giving, isn't it ? A. Yes.

Q. The knowledge that you have obtained in this way ; isn't that so ? A. Yes.

Q. You haven't been drawing on your fancy in giving these answers ; you have been testifying from the

332

333 results of your observation in connection with this business, and your personal contact with it? A. Yes.

MR. ELKUS: As far as his testimony as to what the contents of written instruments are concerned I move to strike out as not the best evidence, as incompetent.

THE REFEREE: Whatever the witness knows that Lathrop, Haskins & Company did in reference to this whole agreement he may testify.

334 Mr. Elkus excepts.

Q. Upon this participation which Lathrop, Haskins & Company had, did they allow their customers to take an interest in their participation?

Objected to as calling for the witness's conclusion.

MR. GARVER: I am getting at what appears on the plaintiff's exhibits.

335 A. Yes.

Q. Referring to Plaintiff's Exhibit 5, giving a list of customers and the amounts due from them, will you please state who in that list participated in either of these Hocking pools? A. Louis Breslauer, C. T. Willard, Berthold Levi, H. O. Seixas, James R. Keene, E. J. Garvan, Mrs. Allela L. Dunn, E. S. Lucas.

Q. That is yourself? A. Yes. Mrs. J. B. Bruyn, W. C. Curtis, W. F. Osborne, Oliver Gildersleeve.

336 Q. And referring to Plaintiff's Exhibit 6, the amount due to customers, who of the customers in that list participated in either of these pools? A. G. S. Boehm, Charles F. Green, Alexander Melchers, F. M. Sharpe, Annie F. Leverich.

Q. Was she the wife of Mr. Leverich who was a member of that firm? A. Mother. That is all.

Q. Referring to Plaintiff's Exhibit 7, being the list of the amount due the members of the New York Stock Exchange, will you state who in that list participated in either of these pools, or were members of the pools, or had some interest in the pools? A. A. J. Elias &

Company, Rollins & Company, Day, Adams & Company were subscribing for Lathrop, Haskins & Co. 337

Q. They were parties to the original agreement ; they executed that agreement at the request of Lathrop, Haskins & Co.? A. Yes. J. M. Fiske & Company ; that was for themselves ; that is all.

Q. How about Roberts, Hall & Criss? A. They were for themselves ; that was a Stock Exchange house ; Criss was the specialist in that stock on the floor.

Q. But they were direct members of the pool, were they ? A. No ; they were not in it at all ; he just executed the orders. 338

Q. He was the broker employed on the Stock Exchange ; Mr. Criss of that firm ? A. Mr. Criss of that firm.

Q. To execute the orders ? A. Yes.

Q. How did this large amount of \$517,258.51 originate ? A. Well, Mr. Criss bought a lot of stock ; it was sold out under the rules for his and Lathrop, Haskins & Company's account ; that represents the loss on it. 339

Q. And he sought to hold Lathrop, Haskins & Company for the loss ? A. Yes.

Q. When did he buy that stock ? A. He bought that on the 19th of January, 1910.

Q. So that that entire claim of Roberts, Hall & Criss grew out of the transaction subsequent to the opening of the Stock Exchange on that day ? A. Yes.

Q. Is that true of any other of those claims ? A. There may have been 200 or 300 shares in Elias's account ; and there may have been a couple of hundred shares in Rollins's and Day, Adams's accounts. 340

Q. Take up the item of \$28,324.49 due to Schuyler, Chadwick & Burnham ; how did that originate ? A. Why Schuyler received an order from Lathrop, Haskins & Company to buy, I think, 500 shares of Hocking stock, and they bought it that morning at the high price and sold it later on ; that is the loss on it.

Q. Take the item of \$70,560.51 due to A. J. Elias & Company ; how did that originate ? A. Part of it was for the stock which they were carrying on their sub-

**341** scription for us ; and as I said before I think there was a couple of hundred shares which they bought on that day.

Q. And the indebtedness was really incurred that day ? A. Yes.

Q. It was the result of the transaction that brought about this indebtedness ? A. Not all ; they were carrying stock for us before that ; they were carrying 900 shares which they were carrying on their subscription.

**432** Q. Do you know about what Lathrop, Haskins & Company owed them at the close of business on the 18th ? A. I think they owed us.

Q. Is that true of Rollins & Company too ? A. Rollins and Day Adams.

Q. How about J. M. Fiske & Company, \$57,458.31 ? A. They executed orders for us on that day, for Lathrop, Haskins & Company ; and of course they did more than the rest of them, and that is why their loss is larger.

**343** Q. You mean on January 19th ? A. On January 19th, yes. J. M. Fiske & Company—I think the most of Fiske's loss was on January 19th ; they may have had one or two hundred shares before that.

Q. That was the firm that you said failed on January 19th ? A. Yes.

Q. Referring to Plaintiff's Exhibit 8 due to banks and trust companies ; did you ascertain the balances in those cases just as you did in the case of the amount due to customers ? A. The same way.

**344** Q. That is, you computed what it would be if the accounts had been closed out at 2.15 that day ? A. Yes.

Q. As a matter of fact they had not been closed out ? A. Some of them had.

Q. Do you recall any that had in that list, Exhibit 8 ? A. I wouldn't state positively whether it was closed out on that day or not ; but there was one of the Metropolitan Trust Company loans, and there was another one.

Q. That was paid off ? A. No ; they sold out ; the

Metropolitan, and there was another one; I don't 345 know what other one it was; they sold out right on that day.

Q. You mean the collateral was sold out by the Trust Company or the Bank on that day, and the proceeds applied— A. Applied to the loan, yes; it may not have been on this list; they may have closed it out at a profit, so that they paid us the money; I wouldn't say how that was.

Q. You are not certain that there was any on that list? A. Not on that list, no.

346

Q. Referring again to Plaintiff's Exhibit 6, amount due to the customers; you stated, as I understand it, that all of those were speculative accounts except the last two on the list; were most of the persons there speculating in this stock, Hocking Coal & Iron? A. No; in fact it was the other way; very few of them were.

Q. They were speculating in miscellaneous securities? A. In miscellaneous securities.

Q. Miss Catherine Leverich, whose name appears 347 in that list; who was she? A. She was a sister of Mr. Leverich.

Q. He was a member of the firm? A. A member of the firm.

Q. And Mrs. Annie F. Leverich you said was his mother? A. His mother.

Q. Who was Miss Maude A. Haskins? A. She is Mr. Haskins's sister.

Q. Mr. Haskins of the firm, you mean? A. Yes.

Q. And Mrs. Marian L. Haskins? A. That is Mr. 348 Haskins' wife.

Q. And L. L. Haskins? A. That is his little boy.

Q. And L. S. Haskins? A. That is his little daughter.

Q. R. F. Little; is that Mr. Robert F. Little, the lawyer, who testified here at the last hearing? A. Yes.

Q. He was speculating in Hocking stock, wasn't he? A. Yes.

**349** Q. He had an interest in the pool, too, didn't he ?  
A. No, not that I know of.

Q. Are there any other relatives of any member of the firm in that list, Exhibit 6 ? A. Yes ; there was Mrs. W. F. Kelley, who was an aunt of Mr. Haskins.

Q. Anybody else that you notice there ? A. Mrs. Lathrop is Mr. Haskins' mother-in-law ; that is, Mr. Haskins married Mr. Lathrop's daughter.

Q. Mrs. Fannie G. Lathrop ? A. Yes.

**350** Q. Who is the Estate of L. C. Lathrop ? A. That is Mr. Lathrop ; he is dead ; Mr. Haskins' father-in-law.

Q. And Miss Florence G. Lathrop ? A. That is Mr. Lathrop's daughter.

Q. And Mrs. Emily H. Florence ; was she related ? A. No.

Q. Mrs. Janet H. Little ; who was she ? A. She is the wife of Mr. Robert F. Little.

**351** Q. Lathrop, Haskins & Company had been hypothe-  
cating stock and bonds of the Hocking Coal & Iron  
Company by their loans for several months before  
their failure, had they not ?

Objected to as immaterial and irrelevant.

THE REFEREE : He may answer.

Exception.

A. Yes.

**352** Q. Had you personally been speculating in Hocking stock ? A. I don't know whether you could call it speculating or not ; I had 110 shares of it ; that was partly in the pool and partly in the trading account.

Q. In the Hocking stock ? A. Only just that 100 shares.

Q. You were familiar with the valuations at which this stock was taken for six months prior to the failure ? A. Yes.

Q. About what was the valuation ? A. The market price.

Q. Had that been below 80 for six months prior to January 19th, 1910 ? A. For six months ; that would

bring it back into July; it was below 80 in July, 353 1909.

Q. How much below? A. It was probably around 60 or 65; between 60 and 65.

Adjourned till Tuesday, March 14th, 1911, at 11 A. M.

—  
NEW YORK, 14 March, 1911. 354

Met pursuant to adjournment.

Present: The Referee, Mr. Elkus, Mr. Garver.

MR. ELKUS: I would like to make a few corrections. On page 67, with reference to O. B. Smith, you stated that unless we heard from you to the contrary all his account might be considered worthless; there is nothing here to that effect.

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MR. GARVER: I have no objection to that.

OSCAR J. HEIG, being duly sworn and examined as a witness for the plaintiff, testifies:

BY MR. ELKUS:

Q. Where are you employed? A. With Referee Dexter; Stanley W. Dexter, Referee in Bankruptcy.

Q. And you are a clerk for him? A. Yes, sir.

Q. Have you produced from Mr. Dexter's files proofs 356 of claims filed by creditors against the firm of Lathrop, Haskins & Company? A. Yes, sir.

Q. Have you produced all the claims that have been filed? A. All that have been filed to date.

Q. Have all these claims been allowed by the Referee? A. Yes.

Q. Do you know how much they aggregate? A. No, I do not. We have them all marked from 1 to 147.

**357** Q. 147 claims filed are there? A. 147 claims.

MR. ELKUS: I offer them in evidence. I will have a statement made of the names and amounts; but may we consider these marked in evidence?

THE REFEREE: Yes.

The papers are marked as one exhibit, of which a statement will be furnished for the record.

**358** (See p. 218).  
No Cross Examination.

EUGENE S. LUCAS resumes the stand:

CROSS-EXAMINATION CONTINUED BY MR. GARVER:

**359** Q. Mr. Lucas, at the close of the last hearing you testified that the stock market quotations for Hocking Coal and Iron common had been around 60 or 65 in July, 1909? A. Yes, sir.

Q. Had they subsequently to July, between July and January 19, 1910, been as low as that?

Objected to as immaterial.

Objection overruled.

Exception.

Q. Had that stock subsequent to July been quoted below 80? A. I couldn't say.

**360** Q. Do you remember any date subsequent to July when it was below 80, and before January 19, 1910? A. No, sir.

Q. Is it not your best recollection that for several months before January 19, 1910, the stock had never been quoted below 80?

Same objection, ruling and exception.

A. I couldn't say any exact date or any time in regard to the price; I would have to look it up.

Q. Haven't you any recollection on that subject ; 361 that is, that the stock had been about 80 for some time ? You held some of that stock yourself, didn't you ? A. Yes.

Q. Haven't you any recollection on that point, say for three months ? A. I wouldn't say it was below 80 any later than December ; that is about as far as I could say.

Q. Do you remember any time in December when it was below 80 ? A. No, sir.

Q. Is that your best recollection, that throughout 362 November and December it was above 80 ? A. I would say it was above 80 during December, but I wouldn't say in regard to November.

Q. Have you any recollection that it was below 80 in November ? A. Not that I could say, no.

Q. Lathrop, Haskins & Company had a good deal of this stock right along, did they not ? A. Yes, sir.

Q. And they would use this as collateral security for their loans ?

Same objection, ruling and exception.

363

A. Yes, sir.

Q. At the different banks and trust companies ? A. Yes, sir.

Q. Do you recall whether that stock was not taken in those loans at about 80 in November and December, 1909, and the first half of January, 1910 ?

Same objection, ruling and exception.

364

A. It was always taken at the market price.

Q. By all the banks and trust companies ? A. Yes.

Q. Lathrop, Haskins & Company had some of the bonds of the Columbus & Hocking Coal & Iron Company, too ? A. Yes.

Q. Did they use those bonds as collateral in their loans ?

Same objection, ruling and exception.

A. Yes.

365 Q. What valuation has been placed upon the bonds in those loans say for three months prior to January 19, 1910 ? A. The market price.

Q. And what was that ? A. Between par and 102½.

Q. Were there bonds in any loans of Lathrop, Haskins & Company on January 19, 1910 ?

Same objection, ruling and exception.

A. Yes.

366 Q. At that price ? A. Yes.

Q. That valuation ? A. Yes, sir.

Q. That was true also of the common stock of the Columbus & Hocking Coal & Iron Company ? A. Yes, sir.

Q. That stock was at that time carried in the various banks and trust companies at a market price which was above 80, was it not ? A. Yes, sir.

Q. In Defendant's Exhibit A, being the balance sheet at 10 A. M. on January 19, 1910, there is this item :

" Due from Customers, bad, \$17,131.04."

Was this total of \$17,131.04 included in the amounts set forth in Plaintiff's Exhibit 5 as due from customers ? A. Yes.

Q. Is that amount included in the claims as to which testimony has been given here that they were worthless ; in other words, those things that were bad at ten 368 o'clock in the morning were not good in the afternoon ? A. No ; \$9,000 of the \$17,000 was Alexander's.

Q. And the remainder was divided up among these other customers ? A. Yes. I can give you some of them. There is Charles Mindeloff ; he was one.

Q. Can't you answer that general question that it must be so ; if it was bad in the morning it was true as to those as to which testimony has been given that they were not worth anything ; that it was included ? A. Yes, they are all included.

Q. How about that item in Exhibit A entitled 369 "Miscellaneous Accounts Receivable, not secured, bad, \$45,035.43"; that continued to be bad, I suppose? A. Yes, sir.

Q. And that amount would be included in the amounts given in Plaintiff's Exhibit 5, as to which testimony has been given? A. Yes, sir.

Q. Referring to Plaintiff's Exhibit 5 and taking the names in order, can you state what amounts on that exhibit represent an indebtedness due from customers which arose between ten o'clock in the morning and 370 2:15 in the afternoon of January 19? How about the first item? A. They were good at ten o'clock and bad at 2:15; that is the idea.

Q. Those weren't all in existence that morning, for instance, were they; take James R. Keene inc. pool, \$62,817.68; did that arise entirely during the day, or was there any of it in the morning at ten o'clock? A. The Keene item was on that day's transactions.

Q. Then begin with the first item there and state what the fact is as to each? A. Well, Louis Bres- 371 lauer; that was a debit in the morning.

Q. For the whole amount? A. Not the whole amount, no; there was a pool loss which was made up by 2:15 by the loss in the pool.

Q. That is what I wanted to get at. Take the next item. A. C. T. Willard was a credit in the morning; the pool loss makes that a debit. John Smith and E. S. Lucas; that was a debit in the morning.

Q. For the whole amount? A. Well, very little difference. Berthold Levi was a credit in the morning, 372 pool loss; Alexander Melchers and H. C. G. Barnaby; this account was a debit, but each of them had other accounts in which there was a credit; E. B. Gethin and H. O. Seixas; that seems to have been a credit in the morning and a debit in the afternoon. H. O. Seixas had a credit in the morning and a debit on account of the pool loss; James R. Keene you have; E. J. Garvan had a credit in the morning and a debit in the afternoon on account of the pool loss.

Q. The pool loss was the loss occasioned by the drop

**373** in the market of the value of Columbus & Hocking Coal & Iron? Yes. H. B. Davis; that is the same, a debit; Mrs. Allela L. Dunn had a credit in the morning and a debit in the afternoon through the pool drop; E. S. Lucas had a debit in the morning and it was a larger debit in the afternoon.

Q. How much was it in the morning? A. About \$500.

Q. And the loss was the result of the drop in the Hocking stock? A. Yes, sir. O. B. Smith had a debit **374** in the morning and the same in the afternoon; Rohde & Haskins Company, debit in the morning and the same in the afternoon; H. C. Haskins, debit in the morning and the same in the afternoon; Columbus & Hocking Clay Construction Company.

BY MR. ELKUS:

Q. How large is that claim? A. \$229,060.41. That was a debit in the morning and a larger debit in the afternoon.

**375** Q. How much of a debit was in the morning? A. \$29,000.

BY MR. GARVER:

Q. The Columbus & Hocking Clay Construction Company increased from about \$29,000 to \$229,000? A. Yes, sir; that was in the bonds. Columbus & Hocking Oil & Gas Company, the debit was the same in the morning as it was in the afternoon; C. C. Cheney, that **376** debit was the same in the morning as it was in the afternoon; Charles Mindeloff, there was a debit in the morning and a debit in the afternoon; B. M. Rosenbaum, that debit was the same in the morning as it was in the afternoon; Harry Inman, he had a credit in the morning and a debit in the afternoon; Miss Harriet A. Stoll had a debit in the morning and a debit in the afternoon; Albert Vanderveer, Jr., had a debit in the morning and a debit in the afternoon. Mrs. Vera Lavergne had a credit in the morning and a debit in the afternoon;

Allan Abbott, no change; J. F. Alexander, no 377 change; George G. Ball, no change; L. Bernheimer, Trustee, no change; Annie E. Crawford, no change; F. M. Cronise, No. 2, no change; M. L. Eisemann, no change; F. A. Guild, no change; Wallace Irwin, no change; Mrs. Evelyn B. MacConnell, no change; Mrs. Carrie H. Midgley, no change; William Ransom, no change; William Rohde, no change; Max Staegeman, no change; C. W. Ray, no change; Columbus Hocking Coal & Iron Company, Expense Account, no change; J. W. Murphy had no account in the morning and a 378 debit in the afternoon; W. G. Nicholas, no change; C. F. Ackerman had a credit in the morning and a debit in the afternoon; Herman Weiss, no change; Mrs. J. B. Bruyn had a credit in the morning and a debit in the afternoon; that was a pool account. W. C. Curtis had a credit in the morning and a debit in the afternoon; pool account. W. F. Osborne, credit in the morning and debit in the afternoon; pool account. Oliver Gildersleeve, credit in the morning and debit in the afternoon, pool account. 379

Q. Referring to Plaintiff's Exhibit No. 7, the first item there, Roberts, Hall & Criss, \$517,258.51; do you know whether that item is disputed or not by the Trustee in Bankruptcy? A. I couldn't say.

Q. In your 2:15 balance sheet I understood that you took as the valuation of the Hocking Coal and Iron common stock, 32? A. 32.

Q. Were there any bonds of that Company included in the assets at 2:15 P. M., upon which you placed a valuation? A. Yes. 380

Q. Which value did you put on those bonds? A. 50.

Q. The amounts shown by Exhibit 8, due to banks and trust companies, were all secured, were they not; secured loans? A. That was the amount that we owed to banks and trust companies?

Q. Yes. A. Yes.

Q. Did that grow out of the foreclosure of the collateral, the selling of the collateral held by them? A. Either the foreclosure or the market price.

381 Q. Some of these you have closed out in the same way ? You have taken them at the market price at 2:15 ? A. Yes, at the market price at 2:15.

BY MR. ELKUS :

Q. Have you given the net sums due to the banks ?  
A. Due to the banks, yes.

Q. The net sums or the gross sums ? A. The net sums.

382 BY MR. GARVER :

Q. That is, you took the market quotations of the securities held by the banks and trust companies at 2:15 on January 19, 1910, and deducted that from the amounts due to the banks ? A. Yes.

Q. And these figures represent the deficiency ? A. They represent the deficiency.

BY MR. ELKUS :

383 Q. Or they were foreclosed by the banks ? A. Some were sold and foreclosed ; where they were sold we took those prices.

BY MR. GARVER :

Q. They were sold sometime subsequently ?

A. There may have been one or two that were sold during that day ; I don't think there were over two.

384 Q. About what margin was required in those secured loans to banks and trust companies ? A. Generally twenty per cent ; in some cases, twenty-five.

Q. And on the morning of January 19, 1910, you estimated that there was a margin there of from twenty to twenty-five per cent in those loans, an average margin ? A. Yes ; yes, sir.

Q. In connection with your duties as the bookkeeper of Lathrop, Haskins & Company did you observe the market quotations of the Stock Exchange securities from day to day ? A. Yes, sir.

Q. Is it the result of your experience that the quo-

tations vary from day to day throughout the year ? 385

A. Yes, sir.

Q. A stock may be selling at a certain figure in the beginning of the year and it may decline during the year, and at the end of the year it may be back at the original figure ; isn't that so ? A. Yes, sir, that has happened.

Q. And is it your experience that the market quotations of stocks dealt in on the Stock Exchange are materially affected by sudden and unexpected events ?

386

Objected to as immaterial.

THE REFEREE : He may state.

Exception.

A. Yes.

MR. GARVER : I just want to show this generally.

Q. Political agitations very often affect the values, such as an approaching election, does it not ; have you noticed that ? A. It affects the values, yes. 387

Q. And an unexpected court decision will affect the values temporarily, will it not, frequently ? A. Yes, sir.

Q. Or the decision of the Interstate Commerce Commission ? A. Yes.

Q. Or such an incident as President Cleveland's Venezuelan message ; do you recall that ? A. Yes, sir.

Q. Or the assassination of President McKinley ? A. Yes. 388

Q. The closing of the Knickerbocker Trust Company in October, 1907, had a profound effect on the market, did it not ? A. Yes, sir.

Q. Do you remember that Lathrop, Haskins & Company obtained a loan or loans at the City Bank on the morning of January 19, aggregating \$500,000 ?

Objected to as characterizing a transaction.

Q. Lathrop, Haskins & Company got a credit that

389 morning for \$500,000 at the National City Bank, did they not?

Same objection.

Objection overruled.

Exception.

A. Yes, sir.

Q. That was placed to the credit of their deposit account?

390 Same objection, ruling and exception.

A. I believe so.

Q. Don't you know that certified checks were drawn against their account that morning? A. Yes, sir.

Q. Look at the statement shown you and state whether that correctly shows the certified checks that were drawn against that account on January 19, and the details as to the payees of the checks respectively?

A. Those are the checks that we drew.

Q. And those checks were certified?

391

BY MR. ELKUS:

Q. Are those all the checks that you drew that were certified? A. Yes; those seem to be all that were certified.

BY MR. GARVER:

Q. And those are the payees of the checks respectively? A. Yes, sir.

392

MR. GARVER: I offer in evidence the part of the paper including the amount, check number and payee, as follows:

Amount	Check No.	Payee.
\$100,095.81.....	103,560	Liberty National Bank.
100,011.11.....	103,557	Guaranty Trust Company
200,340.24.....	103,558	First National Bank
100,273.58.....	103,559	Brooklyn Trust Company
17,500.00.....	103,551	A. J. Elias & Co.
17,700.00.....	103,546	A. J. Elias & Co.
<hr/>		
\$535,920.74		

Q. Those checks were delivered to these respective 393 payees to take up loans of Lathrop, Haskins & Company?

Objected to as immaterial, incompetent and irrelevant.

Objection overruled.

Exception.

A. The Liberty National Bank, the Guaranty Trust Company, the First National Bank and the Brooklyn 394 Trust were in payments of loans.

Q. They were in payment of secured loans? A. Yes, sir.

Q. And when those loans were paid with those checks the securities were delivered to Lathrop, Haskins & Company?

Same objection, ruling and exception.

A. Yes, sir.

395

Q. Please look at the paper now shown you and state whether the facts therein contained correctly set forth the transaction in relation to the securities referred to in the complaint in this action?

Objected to as incompetent, irrelevant and immaterial to any of the issues in this case.

Objection overruled.

Exception.

396

A. Yes, sir.

The paper is as follows:

"The securities for the recovery of which this suit was commenced and a list of which is annexed to the complaint herein, marked 'Schedule A', had all been pledged by Lathrop, Haskins & Co. prior to January 19, 1910, to secure loans obtained by them at different bank-

397      ing institutions, with the exception of the following :  
              200 shares of Hocking Coal & Iron Co. ;  
              50 shares of the common stock of the Missouri, Kansas & Texas Railroad Co. ;  
              50 shares of Anaconda Copper Co. ;  
              50 shares of common stock of National Lead Co. ;  
              50 shares of common stock of United States Steel Corporation.

398      On the morning of January 19, 1910, at the time when Lathrop, Haskins & Co. obtained a credit of \$500,000 from the defendant, The National City Bank of New York, all of said securities, except as aforesaid, were held as collateral by the said banking institutions for such loans, respectively. On that morning, after Lathrop, Haskins & Co. had obtained the said credit of \$500,000 from the defendant Bank, they drew on the said Bank to the full amount of the credit thus obtained, checks which they caused to be certified and which they used in paying off some of their said loans, secured as aforesaid, receiving the collateral held against them, which included all the securities specified in Schedule A annexed to the complaint (other than those hereinbefore specified), with a few exceptions. These exceptions comprise securities which were obtained by Lathrop, Haskins & Co. from collateral in other loans not paid off, the release of which was brought about by substituting for them some of the securities which had been delivered to Lathrop, Haskins & Co. upon payment of the above mentioned loans with the said checks certified by the defendant Bank. The securities thus released by substitution and delivered to the defendant Bank were as follows :  
              300 shares of the common stock, Chicago, Rock Island & Pacific Ry. Co. ;

100 shares of the capital stock of the Consolidated Gas Company; 401

100 shares of the common stock of the American Smelting and Refining Company;

100 shares of New York Central and Hudson R. R. Co."

MR. ELKUS: Will you concede that on the morning of January 19, 1910, Lathrop, Haskins & Company had a credit balance carrying over from the night before in the National City Bank of \$54,319.98? 402

MR. GARVER: They had that balance at ten o'clock; whether it was there at the time these checks were certified I don't know.

MR. ELKUS: I have got here the total amount of certified checks drawn, which aggregates \$535,920.74, consisting of the six checks, the details of which have heretofore been put in evidence.

MR. GARVER: Well, whatever it is.

403

Q. You stated that you had been sixteen years with Lathrop, Haskins & Company and their predecessors?

A. Yes, sir.

Q. How long had the firm been doing business under the firm name of Lathrop, Haskins & Company?

A. I think April 19, 1908, it was formed; that would be two years.

Q. Where was their place of business, on January 19, 1910? A. 60 Broadway.

404

Q. Had it been there for some time, do you know? A. It had been there for nine months.

Q. What was the firm's name prior to that? A. Lathrop & Smith.

Q. And Lathrop, Haskins & Company succeeded Lathrop & Smith? A. Yes, sir.

Q. How long had Lathrop & Smith been in existence? A. From 1899, I think, to 1908; that would be nine years.

**405** Q. Did they succeed some firm? A. They succeeded Lathrop, Smith & Olyphant.

Q. How long had they been in existence? A. That was the firm I went with; I think they started in 188-somewhere in the eighties; I don't know which year.

Q. Had it always been a Stock Exchange house? A. Always.

Q. It was a well known firm? A. Yes, sir.

**406** Q. How long had Lathrop, Haskins & Company and their predecessors been obtaining credit at the National City Bank? A. I should say ever since the City Bank started that system.

Q. Do you remember when that was? A. No, sir.

Q. About 1903, was it? A. I haven't any idea.

Q. It was for several years? A. Oh, yes.

Q. What system do you refer to?

MR. ELKUS: I object; this isn't cross-examination on the question of custom.

**407** THE COURT: I will let him answer this, because I want to know what he means by his answer.

Exception.

A. The system of day loans.

Q. What is that system?

Same objection, ruling and exception.

**408** A. Of sending a note to the bank in the morning and getting a credit.

Q. A credit for the day? A. A credit for the day.

Q. How was that credit paid off? A. By a check in the afternoon.

Q. Weren't payments made on account during the day, as you got money in from deliveries? A. No, sir.

Q. But the loan was paid off every afternoon? A. Every afternoon.

Q. Before three o'clock? A. Before, or right at three.

Q. Was the payment for the exact amount? A. For 409 the exact amount.

Q. But the payments were made during the day, were they not? A. No, sir.

Q. They were on this day of January 19, 1910; checks were sent in during the morning? A. Deposits were sent in.

Q. Well, deposits were sent in, which went to the credit of the account, did they not? A. I don't know how the City Bank keep their books; we sent down deposits.

410

Q. Suppose you make deliveries and get your checks in; didn't you turn them right in to the City Bank? A. As soon as we got a sufficient amount to make up a fair-sized deposit.

Q. And you kept that up for just as long as your deliveries were completed, didn't you; you did that?

A. We sent down deposits; that is all we sent down.

Q. Didn't you deposit all the checks that you received from your deliveries that day? A. Yes, sir.

Q. Each day? A. Yes.

411

Q. These loans are also called clearance loans, are they not? A. I don't know what they call them; I call them day loans.

Q. Were you accustomed to getting those loans every day from the bank? A. Pretty much every day but Saturday.

Q. And they would invariably close at three o'clock, or a little after, each day? A. Yes, sir; we would send them down a check and they would return the note stamped "Paid".

412

Q. And new notes were given every day? A. Every day.

Q. And a settlement was made in the afternoon without any demand?

MR. ELKUS: I object to the use of the word "settlement".

Q. Well, payment was made every afternoon? A. Yes, sir.

**413** Q. And that method of doing business had been in existence for several years with the City Bank? A. Yes, sir.

Q. Did Lathrop, Haskins & Company do this business with the City Bank alone, or did it do the same kind of business with any other banking institutions? A. We only had one bank account.

Q. The one with the City Bank? A. That was all.

Q. There was no similar account then? A. No, sir.

**414** BY MR. ELKUS :

Q. They had no bank account of any other kind as I understand it, with any other bank? A. No, sir.

BY MR. GARVER :

Q. Did you have anything to do with the delivery of the securities to Mr. Kilborn on January 19, 1910?

A. No, sir.

**415** Q. Do you know Mr. Henry D. Hotchkiss? A. Oh, yes.

Q. Did you know him at that time? A. No, sir.

Q. Did you see him at the office of Lathrop, Haskins & Company on January 19, 1910? A. Yes, sir.

Q. Where did you see him?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Exception.

**416** A. I don't exactly remember where I saw him, but I saw him in the office; I know he was pointed out to me as Mr. Hotchkiss; that was all I knew about him.

Q. I think you testified that you are in Mr. Hotchkiss's employment now? A. Yes, sir.

Q. And a suit has been brought by him against James R. Keene, has there not?

MR. ELKUS: The suit has been brought by the Trustee against Keene and others for an accounting.

MR. GARVER : Claiming a balance due ? 417

MR. ELKUS : Well, I don't think any specific claim is made in the suit.

Q. In your statement of the assets as of 2.15, you didn't include any claims against James R. Keene, did you ? A. Yes, sir, there was a claim included.

Q. What claim is that ? A. \$62,817.68.

Q. What was the claim ? A. That represents his portion of the pool loss on that day's transactions.

Q. Is that independent of the claim that is made 418 against him for an accounting in this suit that has been referred to ?

MR. ELKUS : I don't think the witness knows ; that claim, which he always calls the pool claim, is the stocks that were bought for his account by Lathrop, Haskins & Company as a participant in the so-called pool. The suit against him probably does include that also ; does take that into consideration ; an accounting for all his 419 transactions is asked for, but not as the basis of his accounting.

RE-DIRECT EXAMINATION BY MR. ELKUS :

Q. During the day on January 19, 1910, deposits were made in the ordinary way in the account of the National City Bank, which Lathrop, Haskins & Company had with the National City Bank ? A. Yes.

Q. And during the day you drew checks ? A. Yes.

Q. Not only against this so-called day loan, but 420 against your deposits that you made ?

Objected to as calling for the conclusion of the witness.

THE REFEREE : He simply drew the checks on the bank.

Q. You drew checks on the bank, but you drew checks in excess of the \$500,000, didn't you ? A. Yes, sir.

**421** BY MR. GARVER :

Q. There was a small balance to the credit of Lathrop, Haskins & Company before this \$500,000 credit was obtained, was there not? A. About \$54,000.

BY MR. ELKUS :

Q. During the day you deposited the following sums, didn't you: \$100,600, \$83,400, \$31,162.50, \$220, \$127,000, \$200, \$30,283.30? A. Yes, sir.

**422** Q. You have been asked about the values of Hoeking for two or three months prior to January 19; do you know what the values are for two or three months after January 19?

MR. GARVER : I object ; I didn't ask the witness what the values were ; I asked what the Stock Exchange quotations were.

Q. Well, I will change my question to the Stock Exchange quotations ; do you know what they were **423** after January 19? A. For how long?

Q. Well, during the month of January ; from January 19 to February 1st? A. I think the stocks were down below 20, 18.

Q. And during the month of February, 1910? A. I don't know whether it was February or March, but it did go down to 14.

Q. It went down to 5, didn't it? A. Well, that was during the summer of 1910.

Q. What is it to-day?

**424**

Objected to as irrelevant.

Objection overruled.

Exception.

A. The last sale was 2.

Q. And it has been going down steadily during the year 1910, since January 19? A. Yes, sir.

Q. About all these other securities which you testify the values of ; they have all gone down too, haven't they? A. Most of them.

Q. I mean the quotation values on the Exchange? 425

A. Yes, sir.

Q. You were asked by Mr. Garver when you made up these accounts owing from various customers, and you deducted the value of the securities, did you take the market value in the same way as you valued the securities on hand? A. All the same, yes.

Q. Do you know the assets which went into the hands of the Receiver; do you know what they consisted of? A. Yes, sir.

Q. Well, will you give us a list of them; you have 426 got the list here, have you? A. Yes; this is the Referee's, and this is the Trustee's.

Q. You also have a list of the assets which were received by the Trustee, Mr. Hotchkiss? A. Yes, these are the receivership.

Q. How much is the cash? A. \$38,328.91.

Q. And you have here a detailed statement of how it was received, and from whom it was received? A. Yes, sir.

Q. And what was received by the Trustee? A. The 427 difference between \$38,328.91 and \$49,094.43.

Q. How much is that, in cash?

MR. GARVER: I object as being long subsequent to the date of the transactions in question.

Objection overruled.

Exception.

Q. The amount of cash received by the Trustee was 428 \$10,765.52; is that right? A. Yes, sir.

Q. What securities were turned over to the Receiver January 19, 1910? A. 4,000 Hocking Coal & Iron 6 per cent. bonds; January 20, 50 shares of Hocking Coal & Iron stock; January 23rd, \$4,000.00 Hocking Coal & Iron 6's; January 25th, \$22,000.00 Hocking Coal & Iron 6's; January 29th, \$50,000 Hocking Coal & Iron 6's; February 4th, \$13,000 Hocking Coal & Iron 6's. Of these \$8,000 Hocking Coal & Iron 6's have been successfully reclaimed from the Trustee.

**429** Q. This cash received by the Receiver was received between January 19 and April 26? A. Yes, sir.

Q. And the cash received by the Trustee was received between April 28, 1910, and January 17, 1911? A. Yes.

Q. All the stocks in the market that were sold on the Exchange did not go down between 10 A. M. and 2:15 P. M. on January 19? A. No, sir.

Q. Some went up? A. Yes.

**430 RE-CROSS-EXAMINATION BY MR. GARVER:**

Q. Which ones? A. At 10 A. M. Anaconda was  $49\frac{1}{2}$ ; at 2:15 P. M. it was 50; Missouri Pacific at 10 A. M. was  $67\frac{1}{2}$ , at 2:15 it was 69; Southern Pacific refunding four per cent. bonds at 10 A. M. were  $94\frac{1}{2}$ , at 2:15 they were  $94\frac{5}{8}$ , an increase of an eighth.

Q. Are these the only securities that advanced during the day? A. That we were interested in.

Q. That was so generally of the market all that day, was it not? A. Yes.

**431** Q. There was an unusually violent break in the market that day, was there not? A. Yes.

Q. You have been on the Street, you say, for about sixteen years; do you know whether this method of obtaining credit which existed between Lathrop, Haskins & Company and the City Bank was that which generally existed between Stock Exchange houses in the Street and their banks?

**432** Objected to.

A. I don't know.

Objection withdrawn.

Q. You have no knowledge on that subject? A. No, I don't know how other houses do their business.

Q. And your familiarity with the usages of the Street never gave you any information on that point? A. No.

Q. All you know about was the manner in which Lathrop, Haskins & Company did their business? A. Yes, and I don't know whether they treated everybody alike, or made differences amongst different people.

Q. These deposits that you say were made on January 19 with the City Bank, did they represent the proceeds of securities that had been sold the day before?

A. Sold the day before, yes.

Q. And were delivered that morning? A. Yes.

BY MR. ELKUS:

434

Q. Only that? A. Oh, no; there was other cash received there.

BY MR. GARVER:

Q. From other securities? A. From other sources; other than deliveries.

Q. But most of these were from deliveries? A. Most of it, yes, sir.

BY MR. ELKUS:

435

Q. You deposited all the money you received that day? A. Yes.

BY MR. GARVER:

Q. You know the usage in the Street of buying and selling stocks, and that they are bought and sold one day for delivery the following day? A. Yes, sir.

Q. That is the universal usage, is it not? A. Unless otherwise specified at the time.

Q. But it is a rare exception when that is not done, is it not? A. Oh, yes; the regular way is the next day delivery.

Q. And the next day to pay for what you ordered the previous day? A. Yes.

BY MR. ELKUS:

436

Q. You pay on delivery? A. Yes.

**429** Q. This cash received by the Receiver was received between January 19 and April 26? A. Yes, sir.

Q. And the cash received by the Trustee was received between April 28, 1910, and January 17, 1911? A. Yes.

Q. All the stocks in the market that were sold on the Exchange did not go down between 10 A. M. and 2:15 P. M. on January 19? A. No, sir.

Q. Some went up? A. Yes.

**430 RE-CROSS-EXAMINATION BY MR. GARVER:**

Q. Which ones? A. At 10 A. M. Anaconda was  $49\frac{1}{2}$ ; at 2:15 P. M. it was 50: Missouri Pacific at 10 A. M. was  $67\frac{1}{2}$ , at 2:15 it was 69; Southern Pacific refunding four per cent. bonds at 10 A. M. were  $94\frac{3}{4}$ , at 2:15 they were  $94\frac{7}{8}$ , an increase of an eighth.

Q. Are these the only securities that advanced during the day? A. That we were interested in.

Q. That was so generally of the market all that day, was it not? A. Yes.

**431** Q. There was an unusually violent break in the market that day, was there not? A. Yes.

Q. You have been on the Street, you say, for about sixteen years; do you know whether this method of obtaining credit which existed between Lathrop, Haskins & Company and the City Bank was that which generally existed between Stock Exchange houses in the Street and their banks?

**432** Objected to.

A. I don't know.

Objection withdrawn.

Q. You have no knowledge on that subject? A. No, I don't know how other houses do their business.

Q. And your familiarity with the usages of the Street never gave you any information on that point? A. No.

Q. All you know about was the manner in which 433 Lathrop, Haskins & Company did their business? A. Yes, and I don't know whether they treated everybody alike, or made differences amongst different people.

Q. These deposits that you say were made on January 19 with the City Bank, did they represent the proceeds of securities that had been sold the day before? A. Sold the day before, yes.

Q. And were delivered that morning? A. Yes.

BY MR. ELKUS:

434

Q. Only that? A. Oh, no; there was other cash received there.

BY MR. GARVER:

Q. From other securities? A. From other sources; other than deliveries.

Q. But most of these were from deliveries? A. Most of it, yes, sir.

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Q. But it is a rare exception when that is not done, is it not? A. Oh, yes; the regular way is the next day delivery.

Q. And the next day to pay for what you ordered the previous day? A. Yes.

BY MR. ELKUS:

Q. You pay on delivery? A. Yes.

**437 BY MR. GARVER :**

Q. But I mean you pay on orders given the previous day ? A. Yes, sir.

Q. And they commence to make the deliveries as soon as the Stock Exchange opens, do they not, usually ? A. At ten o'clock ; as soon as they can get checks certified.

MR. ELKUS : I offer in evidence two papers produced by the defendant as follows :

**438**

The papers referred to are marked respectively Plaintiff's Exhibit 11 and Plaintiff's Exhibit 12 of this date, and are as follows :

**"Plaintiff's Exhibit 11."**

\$200,000.

NEW YORK, Jan. 19, 1910.

**439**

On demand, for value received we promise to pay to The National City Bank of New York, or order, Two hundred thousand Dollars, hereby agreeing that said Bank shall have a lien upon all property of the undersigned now or hereafter in its possession or under its control, as security for any indebtedness of the undersigned now existing or hereafter contracted, with the right at any time to demand additional security, and with the right, upon default, in payment, to sell, without advertisement or notice to the undersigned, any or all of the securities or property so held, at public or private sale, or to otherwise dispose of the same in the discretion of any of the officers of said Bank, applying the proceeds upon the said indebtedness together with interest and expenses, legal or otherwise, the undersigned to be liable for any deficiency.

**440**

LATHROP, HASKINS Co."

441

**"Plaintiff's Exhibit 12."**

\$300,000.

NEW YORK, Jan. 19, 1910.

On demand, for value received we promise to pay to The National City Bank of New York, or order, Three hundred thousand Dollars, hereby agreeing that said Bank shall have a lien upon all property of the undersigned now or hereafter in its possession or under its control, as security for any indebtedness of the undersigned 442 now existing or hereafter contracted, with the right at any time to demand additional security, and with the right, upon default, in payment, to sell, without advertisement or notice to the undersigned, any or all of the securities or property so held, at public or private sale, or to otherwise dispose of the same in the discretion of any of the officers of said Bank, applying the proceeds upon the said indebtedness together with interest and expenses, legal or 443 otherwise, the undersigned to be liable for any deficiency.

LATHROP, HASKINS CO."

MR. ELKUS: I offer in evidence the receipt signed by Mr. H. M. Kilborn, Vice President of the National City Bank, for the securities which are the subject of this suit, dated January 19, 1910.

It is marked Plaintiff's Exhibit 13 of this date 444 and is as follows:

" NEW YORK, January 19, 1910.

Received from Lathrop, Haskins & Co.,  
200 shares of Southern Pacific com. No. 33893,  
43306.

200 Reading Co. com. No. N6847, N6848.  
100 New York Central No. 149196.  
300 Rock Island Co. com. No. C39816,  
C39817, C26380.

THE NATIONAL CITY BANK,  
H. M. KILBORN, V. Pt."

It is conceded that Mr. Henry S. Leverich is insolvent, that he has no assets, and had no assets on January 19, 1910, and had liabilities which exceeded his assets by \$100,000.

**448**      **MR. ELKUS:** I will reserve the right to call Mr. Haskins out of order to prove his individual insolvency.

**MR. ELKUS:** How about Garvan? Will you admit that he died without leaving any estate of any kind?

**MR. GARVER:** I am willing to concede that the claim is uncollectible out of the estate.

**MR. ELKUS:** I have asked the Receiver of the Columbus & Hocking Clay Construction Company to be here today to prove that the claim which we have against them of \$229,000 is absolutely valueless; but he is engaged in Court

in Columbus, Ohio, and he will come at the 449 next adjourned hearing; I want to close my case, with the reservation to call him. I am going to read Mr. Kilborn's testimony, and then I have finished.

MR. GARVER: I should like to examine Mr. Lucas about these notes.

BY MR. GARVER:

Q. Do you recognize the signature to these two notes, Exhibits 11 and 12? A. That is Mr. Leverich's 450 signature.

Q. Was that the kind of note that had been in use between Lathrop, Haskins & Company and the City Bank? A. Yes, sir.

Q. A note or notes similar to that were given each day, when each day loan was made? A. Yes, sir.

Q. And that had been the usage for a long time? A. Yes, sir, for a long time.

MR. ELKUS: I will now read into the record 451 the testimony of Horace M. Kilborn, by stipulation, with the same force and effect as though he were present:

HORACE M. KILBORN, a witness called on behalf of the Trustee, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ELKUS:

452

Q. Mr. Kilborn, you are one of the vice presidents of the National City Bank? A. Yes, sir.

Q. Which one, if I may ask, if they are numbered? A. They are not numbered.

Q. And were you vice president of that bank in January, 1910? A. Yes, sir.

Q. Did the bank have business transactions with Lathrop, Haskins & Company in the month of January, 1910? A. Yes.

Q. Did you receive, representing the National City

453 Bank, securities from Mr. Haskins in the month of January, 1910? A. You mean from Mr. Haskins personally?

Q. Yes, or from the firm of Lathrop, Haskins & Company? A. Yes, from the firm.

Q. Who was present, who handed them to you? A. I am not sure whether Mr. Haskins or Mr. Hotchkiss handed them to me.

Q. Mr. Haskins was present at the time, wasn't he? A. I believe so.

454 Q. What securities were they, have you a list of them? A. Yes.

Q. Will you read the list? A. 200 Southern Pacific, 200 Reading, 100 New York Central, 300 Rock Island, 100 Consolidated Gas, 100 American Smelting & Refining Company, 200 shares Columbus Hocking Coal & Iron, 300 shares Missouri, Kansas & Texas, 100 Wabash, 250 Anaconda, 100 Texas Pacific, 100 Kansas City Southern, 100 National Lead and 50 United States Steel and 10,000 Union Pacific 4 per cent. convertible bonds.

455 Q. When you speak of one of these names, like New York Central, you mean so many shares of stock of the New York Central & Hudson River Railroad Company? A. Yes.

Q. And the others are the same way? A. Are the same way, yes.

Q. And you received on this occasion actual certificates? A. Yes.

456 Q. To which you referred as to the number of shares—the number of shares you have stated? A. Yes.

Q. What day was it you received those certificates of stock—they were all shares of stock, there were no bonds? A. \$10,000 of bonds.

Q. January 19, 1910? A. Yes.

Q. What time of the day was it, if you know? A. I don't know the exact time.

Q. Half past two in the afternoon? A. I should think it was earlier than that.

Q. My information was it was about half past two;

what time do you say it was? A. I do not think I 457 can tell the time; it was in the early afternoon.

Q. After lunch? A. I had not had my lunch.

Q. After one o'clock? A. It was after one o'clock I should say.

Q. And where was it you received those certificates? A. The office of Lathrop, Haskins & Company.

Q. And where was that? A. At their offices; I do not know that I know the number.

Q. Who was with you at the time, anybody from your bank? A. Yes.

458

Q. From your bank? A. Yes.

Q. Who was it? A. Mr. Albeck.

Q. What is his position? A. Assistant cashier.

Q. What is his full name? A. Stephen E. Albeck.

Q. Will you state the conversation that took place, if any, between yourself and Mr. Haskins before you received these certificates and bonds? A. I do not think I can recall just exactly what Mr. Haskins said. There were many things passed at the time.

Q. What did you say when you came there if you 459 remember? A. I do not know that I know the exact words but I know what happened up there.

Q. If you do not remember the exact words state the substance of the conversation; give us the substance of the conversation as nearly as you can, not the words but the substance. A. I asked for the securities to make good their clearance loans.

Q. Was it a fact before you went there—is that all you remember that was said? A. Yes, that is all that I remember. There was great excitement there; first 460 one man and then another—a dozen talking at the same time.

Q. After you said that, there was some other talk and you received securities? A. Yes, sir.

Q. Now when you went there—before you went there—over to Lathrop, Haskins & Company, they had overdrawn their account with the bank, with your bank—Lathrop, Haskins & Company were depositors in your bank prior to January 20, 1910? A. Yes.

461 Q. And had an ordinary checking account with your bank? A. Yes.

Q. On the morning of January 19th your bank had certified checks drawn by Lathrop, Haskins & Company, to the order of different persons? A. Yes, sir.

Q. And you had certified checks for more money than they had to their credit in the bank? A. That would need some explanation.

Q. I am going to ask you to explain afterwards, if you want to explain. Can you tell me how many 462 checks were drawn by Lathrop, Haskins & Company, and to whose order and for what amount, which were certified by your bank, on the date of the 19th of January before you went to Lathrop, Haskins & Company's office? A. I can tell you the amount.

Q. What were the amounts? A. \$100,095.81, \$100,011.11, \$200,340.24, \$100,273.58, \$17,500 and \$17,700, making a total of \$535,920.74.

BY THE REFEREE:

463 Q. Those were the certifications? A. Those were the certifications.

BY MR. ELKUS:

Q. Those were the certifications before you went there? A. Yes, sir.

Q. Were any more certified that day or were those the entire certifications for that day? A. That is all.

Q. Can you tell me to whose order those various checks were drawn or are you unable to give me that? 464 A. These checks were delivered to Lathrop, Haskins & Company, and we keep no record of the payees.

Q. How much money had been deposited by Lathrop, Haskins & Company, or was there remaining to their credit up to the time you went to call upon them at their office on the 19th of January? A. Do I understand that question to mean that you want the amount to balance?

Q. What was the balance on the morning of the 19th of January? A. I can give you the balance at the beginning of business.

Q. At the opening of the bank on that day? A. 465  
\$54,319.98.

Q. How much was the deposit which was made—just read the amounts off, the cash amounts? A. You mean their total credits on that day, is that the idea?

Q. Just the deposits. A. Do I understand you want the credits of that account?

Q. Give me the deposits and then I will ask you if there were any other credits afterwards; just how much deposits were made that day, just give me the deposits made by Lathrop, Haskins & Company, give 466 me just the deposits by checks or cash first. A. \$100,600, \$83,400, \$31,162.50, \$220, \$127,000, \$200, \$30,283.30.

Q. Those were all the deposits either by checks or cash? A. Yes.

Q. And did your bank credit the account with anything else before you went to see Lathrop, Haskins & Company? A. Yes.

Q. With what? A. We credited them with a clearance loan, or two clearance loans, as we call them. 467

Q. Two clearance loans as you call them. That is, on the morning of that day they had given you promissory notes or hadn't you any notes? A. They gave us a contract, yes.

Q. Have you got the contract? A. I do not believe I have, no.

Q. Will you produce it at some future hearing. A. Yes.

Q. That contract was given to you when? A. I should judge some time between 10:30 and 11:30 that 468 day.

Q. That morning? A. Yes, sir.

By MR. GARVER: Can you tell us what the substance of it was, of the contract?

MR. ELKUS: Objected to as incompetent, irrelevant and immaterial.

THE REFEREE: I will take it.

MR. ELKUS: Exception.

A. It is merely carrying out custom.

469 Q. Just tell me what the substance of it was ? A. The wording of the contract ?

Q. I do not mean the exact words, the substance of it.

THE REFEREE : You had better have the original.

BY MR. ELKUS :

Q. You gave them a credit by reason of that upon 470 that day ? A. Yes, sir.

Q. How much of a credit ? A. A credit ; a total credit of \$500,000.

Q. By reason of that contract ? A. Yes.

Q. Was there any other credit given ? A. That day ?

Q. Yes, before you went to Lathrop, Haskins & Company's place of business ? A. No.

Q. No other credit ? A. No.

Q. Now when you went up there didn't you go there 471 because there was an apparent overdraft by Lathrop, Haskins & Company of 150 to 200 thousand dollars, when you went to Lathrop, Haskins & Company's place of business ? A. Did I believe there was that ?

Q. Yes. A. I did not know when I went to their office.

Q. You did not know how much ? A. No, sir.

Q. Didn't you have any talk with anybody ? A. No, sir.

Q. Did not you ask them for \$150,000 worth of 472 securities ? A. I do not believe I asked them for any amount of securities. I wanted to get sufficient—

Q. (Interrupting). When you went there you had been informed that Lathrop, Haskins & Company had given notice of their suspension and that the suspension had been announced on the Stock Exchange ? A. No—I heard—I was told that the stock which I knew they were heavily interested in had declined heavily and that they were in trouble at the time I started for their office.

Q. What kind of trouble ? A. Financial trouble.

Q. That is, they were on the verge of some kind of **473** bankruptcye ? A. Yes.

Q. And that their bankruptcye was expected any moment ? A. No—I wish you would tell me, please, what you said last about bankruptcye ?

Q. That they were on the verge of some kind of bankruptcye and that their bankruptcye was expected any moment. A. I do not know that I get your point as to what you mean by bankruptcye.

Q. I mean any kind of insolvency or failure to meet their obligations ? A. Yes. **474**

Q. That is, you understood before you went there that they were either about to or had failed to meet their obligations either because of the panic in Hocking or for some other reason ? A. Yes.

Q. Did not the National City Bank receive a letter from Lathrop, Haskins & Company that morning ? A. I am not sure on that point ; I did not see it.

Q. Didn't you go over with the letter or didn't the gentleman who accompanied you have the letter with him ? A. I don't think so. **475**

Q. Announcing their suspension ? A. I don't think he did.

Q. You won't say he did not ? A. No, I don't know.

Q. Now isn't it a fact that what you received from Messrs. Lathrop, Haskins & Company that morning were three demand notes, two of \$100,000 each and one of \$300,000 ? A. I was under the impression one was \$200,000 and the other \$300,000.

Q. You may be right, but they were demand notes **476** aggregating \$500,000 ? A. Yes.

Q. Either two or three in number ? A. Yes.

Q. And was not that the contract which you referred to ? A. Yes.

Q. That is all there was to it, these demand notes ? A. Yes, sir.

By MR. ELKUS :

Q. Was there anything else besides the demand note signed by Lathrop, Haskins & Company that morning,

477 that came from Lathrop, Haskins & Company? A. Whether they delivered anything to us on that morning?

Q. Was there any other paper of any kind that was sent to the bank that morning by Lathrop, Haskins & Company, other than the three demand notes or the two demand notes aggregating \$500,000? A. No other paper that I know of.

Q. Isn't it a fact that you said to Mr. Haskins and Mr. Leverich when you went there that you had certified checks for \$150,000 more than their actual deposits and that in view of the situation of their firm and their being in trouble, you insisted that that \$150,000 be made good, or something to that effect? A. I do not remember about those figures—that I had mentioned any particular amount.

Q. Irrespective of the amount and the figures it is substantially correct? A. I don't think my conversation was with Mr. Haskins.

Q. With Mr. Leverich? A. My conversation was 479 with Mr. Leverich and Mr. Hotchkiss.

Q. Whoever it was, was that the conversation in substance? A. Won't you state that to me again?

Q. Isn't it a fact that you said to Mr. Haskins and Mr. Leverich when you went there that you had certified checks for \$150,000 more than their actual deposits and that in view of the situation of their firm and their being in trouble you insisted that that \$150,000 be made good, or something to that effect? A. That is substantially so, yes.

480 Q. And in response to what you said didn't the person to whom you talked say that they could not give you any securities, that they were about to be petitioned into bankruptcy, in substance that the creditors were then filing a petition? A. No, nobody told me that.

Q. Or words to that effect? A. Nobody told me anything of that kind.

Q. Did they tell you that they had suspended on the Stock Exchange? A. Yes.

Q. That notice of the suspension had already been given—that is understood to be equivalent to failure, isn't it? A. I don't think they told me that.

Q. You knew it? A. There were a number of newspaper men in there.

Q. They told you, the newspaper men? A. I don't know that the newspaper men told me; I do not know who it was told me.

Q. Perhaps I can put it this way. Before you got the securities somebody told you that Lathrop, Haskins & Company's suspension had been announced on the floor of the Stock Exchange? A. Yes.

Q. And that announcement takes what form, Mr. Kilborn, what is said, do you know? A. No.

Q. That they are unable to meet their obligations; isn't that the substance of it? A. I presume so, yes, sir.

Q. What did you say, if you remember now, about getting the securities? Let me see if I can refresh your recollection. Did you ask them to give you the money with which to pay you for the checks which had been drawn and which had been certified and for which you had no security except their demand note, if that was security? Is that what you asked, in substance I mean? A. I asked them for the securities to make good their obligations certainly.

Q. Did you first ask for money? A. I don't think so.

Q. You knew that was useless? A. No, not by any means.

Q. You would have taken the money, wouldn't you? A. I think so, yes, sir.

Q. You asked for security to make good their obligations; that was it, wasn't it? A. Yes.

By MR. GARVER:

Q. The obligations you had in mind were the \$500,000 for the promissory note, or such part of it as you had certified checks against? A. No, there is more to their obligations than the promissory note.

**485** Q. Just tell me the whole thing, what obligations you had in mind.

Objected to as immaterial, irrelevant and incompetent.

Objection overruled.

Exception.

**A.** It is the custom in Wall Street and has been for a good many years that banks furnish a credit so that brokers can clear their stocks. The bank in issuing **486** that credit, it is not a pure credit by any means, it is a credit which is extended so that they can pay up their loans so called and take up securities which they had purchased, with the understanding that this credit is to be made good either by check or the placing of a loan with you to make good that credit which you extended to them. This credit in Wall Street is extended for many millions of dollars.

**Q.** In other words, it is this: You allow each customer of your bank, which is a Wall Street custom, a Stock Exchange custom, a certain right to have checks certified more than the amount which he has on deposit, and for that over certification—I don't mean that in an invidious sense, for that certification they give you a promissory note payable on demand and you expect your customer to make good those checks which are certified before three o'clock on that day by either depositing money to meet that or borrowing money from you to meet that?

**488** Same objection, ruling and exception.

**A.** That is the understanding. That is the understanding to allow our customers.

**Q.** It is the custom, as I think you said, or is in vogue in Wall Street finances with reference to Wall Street transactions? A. Yes.

BY MR. ELKUS:

**Q.** And you did not wait in this case until 3 o'clock to give Lathrop, Haskins & Company a chance to

make good the overdraft because of the notification 489 which you received which you told us about, but went to their office to demand or ask them to give you the money to make good the overdraft or give you securities to take its place?

MR. GARVER: Objected to as immaterial, irrelevant and incompetent.

Objection overruled.

Exception.

490

A. Yes, sir.

Q. By the time you got there you found a notice of their suspension had been announced on the Stock Exchange, and when you got there they told you they were in financial trouble? A. I think that the first I knew of their suspension was while I was in their office.

Q. Then you got the securities and then you had the conversation? A. Yes.

Q. And did they tell you they were in financial trou- 491 ble? A. Yes.

Q. Did they tell you they could not pay? A. I don't think so.

Q. What did Mr. Haskins or Mr. Leverich say to you if you can recollect? A. I think the most of the talk was about their relations with Mr. Keene.

Q. They told you the reason of their financial trouble? A. Yes, sir.

Q. That Keene had done certain things that they characterized or told you about and that he had 492 broken the Hocking stock? A. Yes.

Q. And that they were absolutely forced to the wall? A. I don't know that they said that.

Q. I ask for the substance of it? A. They inferred that, yes.

Q. And did they say anything about bankruptcy? A. Not a word.

Q. Did not say a petition was being filed against them? A. No.

Q. Mr. Hotchkiss, the Receiver, was there at the

493 time? A. Yes. He was not the receiver at that time; he was not appointed receiver until late in the afternoon.

Q. Will you please tell me how much, for what sum, you had certified checks drawn by Lathrop, Haskins & Company on that day that you received the securities from them? A. The total amount \$575,920.74.

Q. What was the total of their deposits which you read off to me before, the actual deposits exclusive of the securities? A. You mean the actual deposits?

494 Q. Yes. A. \$374,845.80.

Q. Now besides that you had credited them with the amount of the two or three promissory notes, had you? A. Yes, sir.

Q. Making a total of \$500,000 against \$374,000? A. Yes, sir.

Q. So that their total credit on your books was \$874,845.80 plus the \$54,319.98? A. Yes.

Q. Which was their balance from the day before? A. Yes.

495 Q. So that the total to their credit during that day, the gross total to their credit during that day, prior to your visit to Lathrop, Haskins & Company's place of business on the 19th day of January was \$874,845.80 plus \$54,319.98 or \$929,165.78, against which sum, the gross total of \$929,165.78, your bank had certified checks drawn by Lathrop, Haskins & Company to the order of various persons on the morning, in toto, to how much, prior to your visit to Lathrop, Haskins & Company? A. \$538,920.74.

496 Q. Will you deduct that from \$929,165.78? A. \$390,245.04.

Q. So that left a balance in their favor at the time you went to visit them of \$390,245.04 according to your books? A. Yes.

Q. And against that they were indebted also in \$500,000 for the demand notes which you held against them for \$500,000? A. Yes, sir, they had also three other charges.

Q. You can give us those if you wish? A. Three other checks, one for \$43.73, another \$18, and one for

\$9,350, representing checks which they had deposited 497 and which had been returned to us, insufficient funds.

Q. That was made up of three items aggregating \$9,411.73, for which you had previously credited their account and subsequently came back no good, and you deducted that from their account ? A. Yes, sir.

Q. That was the situation. You did not know about these return checks before you went up to Lathrop, Haskins & Company, they came in the following day ? A. They came in the same day.

Q. Later in the day ? When you went up to Lathrop, 498 Haskins & Company's place of business on the 19th of January they had a credit on your books, as you explained it, of \$390,245.04 ? A. Against which we had other obligations.

Q. As you have explained ? A. Yes.

Q. Against which you had their promissory notes ? A. Yes.

Q. There should be deducted from that \$9,411.73 leaving a net balance of— A. (Interrupting.) May I ask if I have quoted that certified check amount at 499 \$538,000 or \$535,000 ?

Q. Say whichever it is ? A. \$535,000 is correct.

Q. Now can you tell me anything else that happened at Lathrop, Haskins & Company's place of business ? A. Perhaps only a conversation that I had with Mr. Hotchkiss.

Q. Anything else but that ? A. You mean of whatever nature ?

Q. I do not mean personal talk, anything with reference to these securities you received from Lathrop, 500 Haskins & Company, or their financial condition or their suspension or their insolvency or their bankruptcy ? A. Not that I remember ; no, sir.

Q. Or about the delivery of the securities ? A. Nothing more.

Q. Did Mr. Hotchkiss talk about the securities ? A. I don't remember ; I never met Mr. Hotchkiss in my life until that day.

Q. Or any conversation with reference to the Lath-

501 **Q.**rop, Haskins & Company bankruptcy? A. I don't remember any conversation with Mr. Haskins.

**Q.** With Mr. Hotchkiss either in reference to the bankruptcy or the securities? A. It was regarding the securities.

**Q.** Did you give a receipt for them? A. Yes.

**Q.** You gave a receipt made out to Lathrop, Haskins & Company, didn't you? A. Yes, received the above securities.

502 **BY MR. GARVER:**

**Q.** You referred to the usage in Wall Street. Do I understand that banks which do this business for Stock Exchange brokers enter into a new contract each day for the day as a general thing or else by continuing contracts? A. Do you mean by this—

503 **Q.** (Interrupting.) A Stock Exchange house comes to the bank and wants to make arrangements to clear stocks or else shift the loan. Is that arrangement made for more than one day at a time? A. No, the day of the transaction.

**Q.** The Stock Exchange house then comes to the bank each morning? A. Comes to the bank each morning.

**Q.** And makes an arrangement for that day? A. Yes.

504 **Q.** That arrangement, as I understand it, is to give a credit with which they can either take up the loans that have been called upon them in their business or pay for securities which are to be delivered to them? A. Yes.

**BY THE REFEREE:**

**Q.** You have spoken of the custom and usages of the Street. Now explain more in detail the plan by which brokers obtain accommodation from day to day.

**MR. ELKUS:** Objected to as incompetent, irrelevant and immaterial and in no way an issue in this case.

**THE REFEREE:** I am going to allow this proof

as to custom, but you haven't qualified this 505 gentleman yet.

MR. GARVER: Mr. Kilborn has had charge of this bank for a great many years.

MR. ELKUS: I will concede that.

THE REFEREE: He knows what goes on in this bank, but he may not know what goes on everywhere else.

MR. ELKUS: I will concede that he can testify as to what happened in his own bank.

A. On the broker's request—

506

BY MR. GARVER:

Q. Does this usage to which you refer apply in the case of all of the banks in New York which do business with Stock Exchange houses?

Objected to on the ground that no foundation has been laid.

Objection overruled.

Exception.

507

A. Yes.

Q. And that is done to a very large amount every day?

Same objection, ruling and exception.

A. Many, many millions.

BY THE REFEREE:

Q. How long had Lathrop, Haskins & Company 508 dealt with your bank?

Same objection, ruling and exception.

A. Several years; I haven't the exact information.

Q. And had they during this time been giving their promissory notes in the way you describe each morning?

Same objection, ruling and exception.

A. Nearly every morning.

**509** Q. In varying amounts?

Same objection, ruling and exception.

A. Yes, sir.

Q. Was Mr. Hotchkiss at the office of Lathrop, Haskins & Company when you called there or did he come in afterwards? A. He appeared from another room in a very few minutes after I was there.

Q. Did they state why he was there?

**510** Objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Exception.

A. He stated that he had been called in to help them.

Q. As counsel, or didn't he characterize it? A. I don't think he characterized it. I knew who he was.

**511** Q. Did he say anything as to whether he approved of their delivering these securities to you.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Exception.

A. He said he thought it was our exact right to get the securities and for that reason he advised that they be given us.

**512** BY MR. ELKUS:

Q. Now, Mr. Kilborn, didn't this conversation take place in words or substance, didn't you say in substance to either Mr. Hotchkiss or Mr. Haskins or in his presence, that your bank --that unless these securities were turned over or unless these certifications, which were not taken care of by money, were paid, that there would be no further certifications in the future, that you were against such certification or your bank was, to stockholders, that you personally had

been the man that had stood out for it, and that you 513 gave that as one of the particular reasons why you did not want there to be any loss to the National City Bank, because you had over certified or the checks which had been certified you did not have the money to meet? A. Conversation with Mr. Haskins?

Q. With anybody there? A. I do not believe I said that in the office.

Q. Will you say you did not, in words or substance? A. I can only say perhaps those have been my sentiments, but I do not think fully they have been ex- 514 pressed there or were expressed there.

Q. Those were your sentiments? A. As to the certification?

Q. If a person who was present testified you did say so would you deny it? A. That is a hard question to answer.

MR. ELKUS: With the exception of the matters that I have already detailed and perhaps some matters that I may have overlooked, I 515 rest.

I will move to strike out all the testimony of this witness as to custom or usage, as incompetent, immaterial and irrelevant, and in contradiction of a written instrument and contrary to law, and that it is an attempt, if anything, to avoid the laws against over-certification.

Motion denied.

Exception.

Adjourned till Tuesday 21st March, 1911, at 3 P. M.

516

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Pages 140 to 185,—blank line left for rulings of Referee per counsel's instructions, Referee not being there when hearing began. In a few cases after he arrived, counsel did not give him time to make rulings.

517

NEW YORK, April 3, 1911. 3 P. M.

Met pursuant to adjournment.

Present: THE REFEREE, MR. ELKUS and MR. GARVER.

ROBERT F. LITTLE, recalled, testified as follows:

DIRECT EXAMINATION BY MR. ELKUS:

Q. Mr. Little, what position did you hold with the  
518 Columbus & Hocking Clay Construction Company?  
A. I was secretary.

Q. What kind of a corporation is that? Under what  
laws was that organized? A. New York State.

Q. And did it have any capital stock? A. Its  
capital is \$100,000.

Q. Was that in cash or property or what? A. That  
stock was given for a contract.

Q. And are you familiar with the assets and prop-  
erty, if any, of that company? A. I am.  
519 Q. Do you know whether or not it has any assets at  
the present time? A. It has none to-day.

Q. Did it have any on the 19th day of January,  
1910? A. No. The only assets it had would be the  
right to the delivery of certain bonds on the consent of  
the Hocking Coal & Iron Company. It was, however, in  
default, and those bonds were forfeited and taken over  
by the receiver of the Columbus & Hocking Coal &  
Iron Company. Its obligations exceeded the face of  
those bonds at that time.

520 Q. Well, as I understand it, all that the Columbus  
& Hocking Clay Construction Company had was a con-  
tract to construct a brick plant? A. That is all.

Q. And for such construction, it was to receive  
bonds of the Columbus & Hocking Coal & Iron Com-  
pany? A. Yes.

Q. And the Columbus & Hocking Clay Construction  
Company had defaulted on its contract? A. Yes, sir.

Q. And, therefore, lost the right to receive those  
bonds? A. Yes, sir.

Q. And that was the only asset it ever had or could have? A. Yes, sir.

Q. And is it able to pay the claim of two hundred and odd thousand dollars which is claimed against it by Lathrop, Haskins & Company, or its trustee? A. It is not.

Q. Is it in the hands of a receiver? A. It is.

Q. Who is the receiver? A. A Mr. Seymour, of Columbus.

Q. By what court was he appointed? A. By the United States Circuit Court for the Southern District of Ohio.

Q. That is, by insolvency proceedings? A. Yes.

#### CROSS-EXAMINATION BY MR. GARVER:

Q. How did that company incur this liability of \$229,060.41 to Lathrop, Haskins & Company? A. Lathrop, Haskins & Company advanced money to that company for the purpose of building the brick plant at Kachelmacher, Ohio.

Q. Did Lathrop, Haskins & Company advance this money to the Columbus & Hocking Clay Construction Company? A. They did. I am not familiar with the figures. The books show.

Q. You are testifying as an officer of the company; you ought to know? A. If I had the books, I could tell from them.

#### RE-DIRECT EXAMINATION BY MR. ELKUS:

Q. You mean, you don't know the exact amount? A. No.

#### CROSS-EXAMINATION BY MR. GARVER:

Q. That is approximately the amount? A. Yes, sir.

Q. And what did the company do with all that money? A. The Construction Company?

Q. Yes. A. It paid it out on various contracts for the building of that plant, and it probably spent in a like manner some \$600,000 or \$700,000.

525 Q. On the plant ? A. Yes, sir.

Q. And it had spent that prior to January 19, 1910 ?  
A. Yes, sir.

Q. So that it did have some assets aside from the contract, didn't it ? A. No. That was the only assets it had. You mean that money ?

Q. No. I mean its plant that it was constructing ? A. The plant was on the property of the Columbus & Hocking Clay & Brick Manufacturing Company. Its contract was to build it on the land of the Columbus &

526 Hocking Clay & Brick Manufacturing Company.

#### RE-DIRECT EXAMINATION BY MR. ELKUS :

Q. It borrowed all this other money, too, didn't it ?

A. They received bonds for their contract and borrowed money on their bonds, and they had borrowed in excess of the amount of their bonds at that time.

#### RE-CROSS-EXAMINATION BY MR. GARVER :

527 Q. Did it have any interest in this brick manufacturing plant ? A. Not the slightest except through the holding of the bonds which it had already deposited at that time or borrowed upon.

Q. Well, it had borrowed on the bonds, hadn't it ? A. It had, from Lathrop, Haskins & Company.

Q. And hadn't it put up a lot of those bonds with Lathrop, Haskins & Company ? A. As collateral ?

Q. Yes. A. They had.

528 Q. How many bonds did Lathrop, Haskins & Company have as security for those advances ? A. Mr. Lucas could tell, and I cannot tell.

MR. ELKUS : How many, Mr. Lucas, if you know ?

MR. LUCAS : Yes, four hundred.

Q. \$400,000 par value ? A. Not against this balance.

EUGENE S. LUCAS, recalled, testified as follows : 529

DIRECT EXAMINATION BY MR. ELKUS :

Q. Lathrop, Haskins & Company had received \$400,000 of bonds from the Columbus & Hocking Clay Construction Company ? A. Yes, sir.

Q. What bonds were they ? A. Six per cent. bonds.

Q. Of what company ? A. Second mortgage twenty year Coal & Iron bonds, six per cent. bonds.

Q. And those were given to Lathrop, Haskins & Company for what purpose ? A. As security for their 530 advances.

Q. To whom ? A. To the construction company.

Q. And what became of the bonds ?

MR. GARVER : Objected to, "what became of the bonds".

A. Lathrop, Haskins & Company used them in their loans.

A. And they have all been sold out ?

531

MR. GARVER : The same objection.

A. Pretty much, I don't know.

Q. The only ones, if there are any left that appear in the schedule of the assets which you have produced on behalf of the trustee ? A. Yes, sir.

Q. All the others have been disposed of ? A. Yes, sir.

Q. Explain how the \$229,000 is placed in the statement of assets of Lathrop, Haskins & Company, now 532 in the hands of the trustee ? A. The debit balance of the account was about \$429,000, and there were 400 of these Columbus & Hocking Coal & Iron Bonds against it, and we liquidated those 400 bonds at 50.

Q. Is that the market price ? A. I don't know what the market price was ; making a credit of \$200,000 so that makes the balance on the account about \$229,000.

Q. Why did you take the liquidation price at 50 ?

MR. HOTCHKISS : I did.

533 Q. I will ask you, Mr. Lucas, this question: After January 19, 1910, do you know at what price the bonds of the Columbus & Hocking Coal & Iron Company were selling?

BY MR. GARVER:

Q. Do you know of any sales? A. Oh, yes.

Q. What did they sell for at those sales that you know of? A. They sold all the way from 60 down to 25 at auction.

534

BY MR. ELKUS:

Q. Those sales by whom, Adrian H. Mueller? A. By banks.

Q. Where were the sales? A. At Mueller's.

Q. Adrian H. Mueller & Company on the real estate exchange? A. Yes, and some were dealt in around the Street.

Q. Was 50 the average price for the sales for a considerable period after January 19, 1910? A. Yes.

535

CROSS-EXAMINATION BY MR. GARVER:

Q. What had they been quoted at prior to January 19, 1910? A. From 101 $\frac{1}{2}$  to 104 $\frac{1}{2}$ .

Q. They were not in default on January 19, 1910? A. They paid a coupon on January 1st.

Q. And they had never been in default? A. No, sir.

Q. How old an issue was it? A. Four or five years.

Q. And was that the average price during the four 536 or five years, along around par? A. They never sold at less than par that I know of.

Q. Do you know as a matter of fact when those bonds were sold—how soon after January 19, 1910, the bonds that were held as collateral by Lathrop, Haskins & Company? A. No, sir.

Q. It was some time, wasn't it? A. It may have been two weeks.

Q. May it have been two months? A. The first sale was within two weeks after the first.

Q. Do you know when the last sale was? A. The 537 last sale of which bonds?

Q. Yes, of the Lathrop, Haskins & Company bonds? A. They ran through June or into July.

Q. Of 1910? A. Yes, sir.

Q. Do you remember what the last sales, what the selling price was of the last sales? A. The last sale was around, I think, 56 or 58.

BY MR. ELKUS:

Q. When was that? A. I should think that was 538 sometime around in the Summer, during June and July or August.

Q. 1910? A. Yes, sir.

Q. Do you know whether or not the Columbus & Hocking Coal & Iron Company is now in the hands of receivers? A. Yes, sir.

Q. Who are the receivers? A. Mr. Barber and Mr. Thurman.

BY MR. GARVER:

539

Q. By whom were they appointed, if you know? A. By the (pausing)—I don't know.

Q. By the United States Court? A. By the United States Court.

Q. By the United States Circuit Court for the Southern District of Ohio? A. Yes, sir.

Q. In insolvency proceedings? A. Yes, I was the complainant. The receivers were appointed on an insolvency bill filed by Mr. Hotchkiss, as receiver in 540 bankruptcy, as a stockholder and a bondholder of the road, and by some creditor of the company representing its floating debt. It was a general creditors' bill for the marshalling of assets on the grounds of insolvency. The receiver is still in possession and the receiver was appointed January 25, 1910.

MR. ELKUS RESTS.

**541** STEPHEN E. ALBECK, called as a witness on behalf of the defendant, and duly sworn, testified as follows :

DIRECT EXAMINATION BY MR. GARVER :

Q. Mr. Albeck, what is your occupation ? A. I am assistant cashier of The National City Bank of New York, the defendant in this case.

Q. And how long have you occupied that position ? A. Since 1903.

**542** Q. And before that, what did you do ? A. Just prior to that, I was general bookkeeper for a number of years.

Q. At the bank ? A. Yes, sir.

Q. How long have you been in the service of the National City Bank ? A. Twenty-three years.

Q. And you were assistant cashier of the bank, then, on January 19, 1910 ? A. Yes.

Q. What were your duties at that time in the bank ? A. Why, general, one of them—one of my duties was

**543** the granting of the clearance loans.

Q. You mean loans to stock exchange houses ? A. Yes, sir.

Q. Did you have charge of that at that time ? A. Yes, sir.

Q. And had you had charge of that business for some time ? A. Yes, sir.

Q. For how long about ? A. Five years.

Q. And prior to that, were you familiar with these stock exchange day or clearance loans, as they are called ? A. Yes, sir.

Q. And for how long had you been familiar with that particular class of loans ? A. Oh, ever since it originated. I knew of the fact that these clearance loans were made.

Q. And the manner in which they were made ? A. Yes, sir.

Q. And paid ? A. Yes, sir.

Q. Do you remember on January 19, 1910, going over to the office of Lathrop, Haskins & Company

with Mr. Kilborn, one of the vice-presidents of the bank ? A. Yes, sir.

Q. State as well as you can recollect the facts, when you went over there, and what you did when you were there and when you returned ? A. My attention was called to the fact—

BY MR. ELKUS :

Q. Your attention was what ? A. We went over to Mr.— Mr. Kilborn and I went over to the office of Lathrop, Haskins & Company.

545

BY MR. GARVER :

Q. About when ? A. Between half past eleven and twelve o'clock. I should say it may have been twenty minutes to twelve ; and we were invited into the office and we saw two or three gentlemen there, Mr. Little was one, and Mr. Haskins was another, I think, and we stated why we came there.

Q. What did you say at that time, Mr. Albeck, when you first went in and saw those persons there with Mr. Haskins ? A. Mr. Kilborn spoke to them and said that they had noticed the Hocking Coal & Iron stock was breaking badly and we came over to see what condition the firm was in and I cannot recall all of the conversation that was held there, but we were told to wait, that there was a gentleman coming in to advise with them. After we had told them what we expected, to take care of their clearance loan, that was what our object was in coming over there—

547

548

MR. ELKUS : (Interrupting) I object to your object. State what you said.

A. (Continuing) We stated that we had come over to see what they were going to do toward taking care of their clearance loan which we had given them in the morning, and they said—

Q. (Interrupting) Who said ? A. Mr. Little and Mr. Haskins said that they were at the present time—they could not tell where they were at, but they ex-

549 pected a gentleman in shortly to advise with them and we could wait until after they had had their interview if we liked. We chose to wait and after about an hour we were introduced to Mr. Hotchkiss.

Q. Mr. Henry D. Hotchkiss, the plaintiff in this suit? A. Yes. Mr. Kilborn says he said to him—

MR. ELKUS: I object to that.

Q. Was Mr. Haskins present? A. Mr. Haskins and 550 Mr. Little were there.

Q. And what did Mr. Kilborn say? A. He started to state to Mr. Hotchkiss the object of our visit, and Mr. Hotchkiss told him that he was thoroughly familiar—that he knew why we came there, and he understood that perfectly well, and there were certain obligations that should be taken care of, and on account of that being the only room that they had for a conference, we were invited to step across the hall into one of the other offices, which we did. We remained 551 there for about an hour, or for a long time, and finally we were asked to step into the office, which we had been in previously, and we were handed certain securities, for which we gave a receipt. The securities were handed to us by Mr. Dunn, who I believe was cashier at that time.

Q. And those are the securities that are described in the complaint in this action? A. Yes, sir.

Q. And then did you and Mr. Kilborn return to the bank? A. Yes, giving a receipt for these securities, 552 we returned to the bank.

Q. And do you remember about when that was? A. Well, it was say half past two.

Q. When you got the securities? A. No, when we were in the office; after we had returned to the office.

Q. Have you any way of fixing the time as to whether it was before three o'clock or not? A. Yes, sir. We have an officers' meeting at three o'clock.

Q. Every day? A. Every day, and we had put the securities in the loan department and had been up to luncheon and attended this meeting.

Q. And were you at that meeting promptly on that day? A. Yes, we were at that meeting promptly on that day.

Q. Did you personally make this day or clearance loan to Lathrop, Haskins & Company that morning for \$500,000? A. Yes.

Q. And did you receive the two notes executed by them, Plaintiff's Exhibits 11 and 12? A. Yes.

Q. Had you personally had charge of making similar loans to them previous to January 19? A. Yes.

Q. For how long? A. Oh, for five years.

554

Q. And what was the custom of the parties?

MR. ELKUS: I object.

Q. In what manner was this business done with them?

MR. ELKUS: Objected to as incompetent, irrelevant and immaterial; in what manner it was done; this transaction speaks for itself and it must stand on its own basis.

555

A. The notes were brought in in the morning at ten o'clock. They were placed to the credit—and at the close of business at three o'clock they were taken up by their check, which check was made good by deposits made during the day.

MR. ELKUS: I move to strike that out as irrelevant and being an assumption and not a fact.

556

Q. Was a new loan made to them each day? A. Each day.

Q. And that had been the manner of conducting this business with them during the five years that you had charge of it?

The same objection; objection overruled; exception for Mr. Elkus.

A. Yes.

557 Q. And every day was a new note executed and given to the bank ? A. Yes, sir.

Q. And every day previously that loan had been paid off by about three o'clock ?

MR. ELKUS : The same objection.

Objection overruled ; exception for Mr. Elkus.

A. Yes.

Q. When these loans were made in this manner, to  
558 Lathrop, Haskins & Company, did the bank certify against the amount represented by the loans ?

MR. ELKUS : The same objection.

Objection overruled ; exception for Mr. Elkus.

A. Yes.

Q. Did you personally have any supervision of the account of Lathrop, Haskins & Company during the day after the loans were made to see whether they  
559 were making deposits to their credit ? A. Always ; the fact is that if a deposit was not made to their credit promptly after a reasonable time had elapsed, say half an hour or an hour after the opening of business, it was reported and we generally called them up to find out—called up the brokers to find out what was the occasion of the delay.

560 MR. ELKUS : I object to that and move to strike it out as to what they generally did, as being incompetent, irrelevant and immaterial.

Q. When did you in the ordinary course of business expect deposits would begin to be made to their account ?

MR. ELKUS : The same objection.

A. They should be made from half-past eleven to twelve o'clock right on through the day, just as fast as

they could make the deliveries of the securities, and 561 deposit the checks.

MR. ELKUS : I move to strike that out as incompetent, irrelevant, immaterial, and simply as guesswork and expectation and belief.

Q. And if the deposits in that account did not commence to be made by half past eleven, then would you make inquiry to see whether there was any reason ?  
A. Yes, sir.

562

MR. ELKUS : The same objection. They are all purely hypothetical questions.

Q. Do you know whether the same method of conducting business with Lathrop, Haskins & Company and their predecessors in business had prevailed prior to the time when you said that you became assistant cashier and had personal charge ?

MR. ELKUS : The same objection.

563

A. Yes.

Q. For how long have you been familiar with this manner of doing business with Lathrop, Haskins & Company and their predecessors ?

MR. ELKUS : The same objection.

A. Eight, nine or ten years. It is hard to tell. I cannot tell just how long, but it was a long while since 564 I had been personally familiar.

Q. And during that time, there had been no variation in the manner of doing business ?

MR. ELKUS : The same objection.

A. None.

Q. A new loan was made each morning and was paid off by the close of business hours the same day ?  
A. Yes, sir.

**565** Q. And then each day the obligation or obligations given in the morning were surrendered in the afternoon upon payment of the amount due?

MR. ELKUS: The same objection.

A. Yes.

Q. Have you any idea of the amount of business that you did in this way with Lathrop, Haskins & Company during the period prior to January 19, 1910?

**566**

MR. ELKUS: The same objection.

A. To the extent of \$300,000 a day, and on rare occasions they might ask for a little extra,—they did on this occasion;—which was to be quickly liquidated.

MR. ELKUS: Objected to and I move to strike it out, "which could be quickly liquidated," as being a supposition and not evidence.

**567** Q. In other words, when they did ask for more than \$300,000, the excess was paid up very soon, was it?

MR. ELKUS: Objected to as incompetent, irrelevant and immaterial, as being purely guess work and imaginative.

A. Invariably.

**568** Q. Did you observe personally how the checks came in subsequent to the making of those loans that were placed to the credit of Lathrop, Haskins & Company, that is, whether they came in all cases direct from the office of Lathrop, Haskins & Company or whether they came from other sources?

MR. ELKUS: You mean on the 19th of January?

Q. I am speaking generally.

MR. ELKUS: I object to that as being irrelevant and immaterial and as having nothing to do with the issues here.

A. The checks were presented by the messengers of **569** Lathrop, Haskins & Company.

BY MR. ELKUS:

Q. Did you see them? A. I didn't see the checks.

Q. Or the messengers?

BY MR. GARVER:

Q. Didn't you observe them coming in from time to time? A. Oh, yes, the checks coming in?

Q. Yes. A. I would not see the checks personally. **570** The records would show that they came in.

MR. ELKUS: I object to what the records would show. That is not evidence.

Q. Since you have been assistant cashier, has the National City Bank made similar day loans to any other stock exchange house?

MR. ELKUS: I object to that, to what they did with other stock exchange houses. It is incompetent, irrelevant and immaterial. **571**

THE REFEREE: He may answer.

Exception for Mr. Elkus.

A. We have about 100 such houses to whom we make day loans daily.

Q. And is the method of making those loans and having them paid off the same as that which you have **572** described as applicable to Lathrop, Haskins & Company?

MR. ELKUS: The same objection.

A. Yes.

Q. That is, each morning, in the case of a stock exchange house, you would make what is called a day or a clearance loan? A. Yes, sir.

**573** Q. And such loans are paid off at the close of business on the same day on which they are made?

MR. ELKUS: Objected to; that is a very leading question.

A. Yes, sir, on the same day on which they are made.

Q. Can you mention a stock exchange house with whom you did business in that manner?

**574** MR. ELKUS: I object to that as incompetent, irrelevant and immaterial.

Objection overruled; exception for Mr. Elkus.

Q. Does this list shown you correctly state the stock exchange houses with whom you make such day or clearance loans? A. Yes, sir.

MR. GARVER: I offer it in evidence.

**575** List received in evidence and copied into the record, the same being as follows:

J. M. Amory & Son.	Kuhn, Loeb & Co.
Asiel & Company.	Kean, Taylor & Co.
J. S. Bache & Co.	Ladenburg, Thalman & Co.
H. F. Bachman & Co.	Lehman Bros.
Betrom, Griscom & Jenks.	A. S. Leland & Co.
Blair & Company.	Lewisohn Bros.
S. W. Boocock.	Lee, Krekmar & Co.
Bunnell & Co.	W. E. Lauer & Co.
Bouvier & Co., M. C.	Logan & Bryan.
<b>576</b> Bamberger Bros.	McCormick Bros.
F. B. Cahn & Co.	T. L. Manson & Co.
Carpenter, Baggot & Company.	Martin & Co.
Chandler Bros. & Co.	Mackay & Co.
E. R. Chapman & Co.	E. Naumburg & Co.
Clark, Dodge & Co.	J. L. Newborg & Co.
H. L. Crawford & Co.	Jas. H. Oliphant & Co.
Cummings & Markwald.	J. Hugh Peters & Son.
Colgate & Co.	Popper & Sternbach.
S. B. Chapin & Co.	Post & Flagg.

Coffin & Co.	Potter, Choate & Prentiss.	577
Carpenter & Co.	Proctor & Borden.	
J. W. Davis & Co.	Probst, Wetstar & Co.	
E. L. Day & Co.	Pyne, Kendall & Hollister.	
Dominick Bros. & Co.	Raymond, Pynchon & Co.	
Danzig & Co.	Redmond & Co.	
Darr & Moore.	E. & C. Randolph.	
DeHaven & Townsend.	Shearson, Hammill &	
Edey, Guthrie & Mac-	Company.	
Donell Co.	Wm. Salomon & Co.	578
Harvey Fisk & Sons.	Schafer Bros.	
J. N. Fertig.	Scholle Bros.	
Fisk & Robinson.	J. & W. Seligman & Co.	
Goldman, Sachs & Co.	Edw. B. Smith & Co.	
P. J. Goodhart & Co.	Speyer & Co.	
R. M. Grant & Co.	Sutro Bros.	
Graham, Vaughan & Co.	Seligsburg & Co.	
Halle & Stieglitz.	Lionel Sutro.	
Hallgarten & Co.	Simpson, Pearce & Co.	
N. W. Halsey & Co.	Seidenberg, G.	579
N. W. Harris & Co.	Taylor, Livingston & Com-	
Harris, Winthrop & Com-	pany.	
pany.	R. H. Thomas & Co.	
Chas. Head & Co.	C. W. Turner.	
Heidelbach, Ickleheimer	Talbot J. Taylor.	
& Co.	L. Von Hoffmann & Co.	
Herzfeld & Stern.	Wardwell & Adams.	
Hornblower & Weeks.	Watson, Hollins & Co.	
Colgate, Hoyt & Co.	Werner & Brown.	
Hollister, Fish & Co.	Robt. Winthrop & Co.	580
Imbrie & Co.	Webb & Prall.	
Jesup & Lamont.		
Kraus Bros. & Co.		

Q. Do you know about what is the average daily amount of these day or clearance loans that are made in this manner to stock exchange houses by the National City Bank?

MR. ELKUS: I object to it as incompetent, irrelevant and immaterial, and it cannot be of

581 any use in this case, and it is no evidence against this complainant.

Objection overruled ; exception for Mr. Elkus.

A. An average amount of \$18,000,000 daily.

Q. How long has the National City Bank been making such loans to your knowledge ?

MR. ELKUS : The same objection.

582 Objection overruled ; exception for Mr. Elkus.

A. Oh, twenty years.

Q. And how long have they been taking obligations similar to Plaintiff's Exhibits 11 and 12 ?

MR. ELKUS : The same objection.

A. Since 1903, about 1903.

583 Q. And in what manner was the business conducted prior to that time, if it differs from the manner in which it is now conducted ?

MR. ELKUS : The same objection.

Objection overruled ; exception for Mr. Elkus.

A. It was done by over-certification.

Q. Was that manner of doing business objected to by the Comptroller of the Currency ?

MR. ELKUS : The same objection.

584 Objection overruled ; exception for Mr. Elkus.

A. Yes.

Q. Do you know whether the present method was approved by the Comptroller of the Currency ?

MR. ELKUS : I object to this question, particularly, as it is incompetent, irrelevant and immaterial.

Objection overruled ; exception for Mr. Elkus.  
(Argument by counsel.)

Q. Do you know whether the Comptroller of the 585 Currency has ever objected to this method of doing business?

MR. ELKUS: I object to it as incompetent, irrelevant and immaterial. It is not shown that he has ever spoken to the Comptroller about it.

Objection sustained; exception for Mr. Garver.

586

CROSS-EXAMINATION BY MR. ELKUS:

Q. Mr. Albeck, did you go directly from Lathrop, Haskins & Company's place of business back to the National City Bank? A. Yes, sir.

Q. And Lathrop, Haskins & Company's office was where? A. On Broadway. I cannot remember the number. 66, I think.

Q. Well, within two or three minutes' walk from the bank. A. Yes, sir.

587

Q. And either you or Mr. Kilborn took with you the securities which you had received from them? A. Yes, sir.

Q. Now, you say you left the bank about half past eleven on the morning to go to Lathrop, Haskins & Company's office; is that right? A. Well, I said about twenty minutes to twelve; I said between half past eleven and twelve o'clock.

Q. At that time had the suspension of Lathrop, Haskins & Company been announced on the Stock 588 Exchange? A. No, sir.

Q. Did you hear of their suspension while you were at Lathrop, Haskins & Company's office? A. We heard of it at the office.

Q. After you got there? A. Yes, sir.

Q. And before you received the securities? A. Yes, sir.

Q. And you knew that Lathrop, Haskins & Company were interested in the Hocking Company's stock,

589 the Columbus & Hocking Coal & Iron Company's stock ? A. Yes, sir.

Q. And was it you that called Mr. Kilborn's attention to the fact that the stock was going down ? A. Yes, sir.

Q. And that you had loaned to Lathrop, Haskins & Company \$500,000 that morning ? You told him that when you called his attention to that ? A. I called his attention to the fact of the drop in the securities, and that we had made them a clearance loan of 590 \$500,000.

Q. And you also looked and examined their deposits before you left to go to Lathrop, Haskins & Company's, and also that they had deposited how much ? A. I cannot give the amount, Mr. Elkus. The difference in the account was about \$117,000, as I remember it.

Q. You looked to see how much they had deposited and how much had been certified as against the loans, and found that there was a difference of \$117,000 or 591 thereabouts ? A. Or whatever the figures were ; I cannot give them.

Q. Well, around that sum, and you told that to Mr. Kilborn ? A. Yes, sir.

Q. And you expected that Lathrop, Haskins & Company would fail, didn't you ? A. No.

Q. You went there to protect yourself in case there was a failure, didn't you ? A. Yes.

Q. So that you would be secured in case Lathrop, Haskins & Company had to fail or go into bankruptcy ? That was your object in going up there ? A. Yes, sir.

Q. And after you got there and heard of their suspension you did then expect their failure, didn't you ? A. Well, not necessarily.

Q. You had a reasonable ground to believe that they were going to fail or become bankrupt ? A. Not necessarily.

Q. No ; but you did, didn't you ? A. No.

Q. Wasn't that a fair expectation ? A. Suspensions do not always mean failures.

Q. But in most cases, they do, don't they? A. In 593 most cases, yes.

Q. Anyhow, you knew by a suspension on the Stock Exchange that Lathrop, Haskins & Company were unable to meet their obligations at that time? A. At that time.

Q. Whether they would be able to meet them afterwards or not was a question? A. Yes.

Q. But at the time the suspension was announced, you knew as a matter of certainty that they could not meet their obligations? A. Yes, sir.

594

Q. How long was it after you heard of the suspension that you got the securities? A. I received these securities about two o'clock, Mr. Elkus; I cannot tell you when I heard of the suspension.

Q. You heard of the suspension immediately after it was announced on the floor of the Stock Exchange? It came right out on the ticker? A. Yes.

Q. Or just a minute afterwards, and you were there in the office and saw it come out? A. Yes.

595

BY THE REFEREE:

Q. Was somebody always at the ticker? A. In and out; various members of the firm would run up to it and look at it.

BY MR. ELKUS:

Q. You heard some one say as soon as it came out on the ticker that Lathrop, Haskins & Company or the firm or their suspension has just been announced on the floor of the Stock Exchange? A. Yes.

596

Q. And you knew as a fact that that comes out on the ticker within a very few minutes after it has been announced on the floor of the Stock Exchange? A. Yes.

Q. And didn't Mr. Little or Mr. Haskins tell you that they could not go on because of what had happened in the Hocking Company's stock? A. That was about what he said, that they had—as he may have put it—

Q. Tell me what he said? A. He said that they

**597** had,—that the stock had been sold out, and that there would be a great scandal if the truth of the matter was known and he mentioned the fact that Mr. Keene had not played in good faith with them.

Q. And then he said, did he not, that they would have to go into bankruptcy ? A. No ; that under the conditions they could not meet their obligations.

**598** Q. You understood by that that they would have to go to the wall or go into bankruptcy ? A. It didn't always mean that they would have to go into bankruptcy.

Q. Did they state that they could not meet their obligations ? A. By that you mean—

Q. That Mr. Haskins or Mr. Little told you that ? A. Yes.

Q. And did they say that they would be forced to the wall by what had happened ? A. Yes.

Q. And you understood by their saying, "being forced to the wall," you understood by that that they would fail in business ? A. Yes.

**599** Q. And usually a failure of that kind is followed by bankruptcy in your experience ?

MR. GARVER : Objected to as incompetent.

A. Not necessarily.

Q. Isn't that the usual thing ? A. No, I don't think it is.

**600** Q. Mr. Kilborn has testified, Mr. Albeck, that he got there at one o'clock, after one o'clock ; he was sure of it ; when he got there the first time. A. It was after one o'clock when he got there the first time ?

Q. He testified to that. A. I think that is a mistake.

Q. Have you testified about giving an account of what took place before to-day ? A. Never.

Q. And Mr. Kilborn testified within a few months, I think, six weeks, after it happened. Do you wish to correct your testimony after hearing that ? A. My testimony, I wish to have it stand.

Q. You said you went there to inquire about the

condition of Lathrop, Haskins & Company because of 601 what you had heard about Hocking stock ? A. What had been reported as the quotations.

Q. When you say you went to inquire about their condition, you meant their financial condition, didn't you ? A. Yes.

Q. You meant you went there to ask how much they owed and what assets they had ? A. And what—our object in going there ?

Q. No, no ; did you mean that ? Yes or no ? A. Yes.

Q (The next to the last question was repeated). A. 602 Oh, no.

Q. Didn't you say you did ? When you say you went there to ask them about their financial condition, didn't you mean that you went there to find out whether they were solvent or insolvent ? A. I went there—

Q. (Interrupting) Yes or no, if you please ? Can you say yes or no to that ? A. No.

Q. You can't ? A. No.

Q. Did you go there to find out whether they were going to pay what they owed you ? A. I went there to find out—

Q. (Interrupting) Yes or no, if you please ? Did you go there to find out if they would pay you ? A. Yes.

Q. Did you ask them to pay you ? A. Yes.

Q. And they said they could not pay you ? A. They requested us to wait.

Q. Didn't they say that they could not pay you any 604 money ? A. They didn't make that statement.

Q. They asked you to wait until when ? A. Until they could have a conference.

Q. You asked for security, didn't you ? A. We asked for the money or security.

Q. And they said they had no money ? A. I don't concede that ; I don't remember that they made that statement.

Q. And then you waited a whole hour and then you saw Mr. Haskins ? A. Yes.

605 Q. And then you waited another hour and then you got the securities? A. Yes.

BY THE REFEREE:

Q. You stayed out there in the office? A. Yes.

BY MR. ELKUS:

606 Q. And in the meantime you had heard about the suspension on the stock exchange of Lathrop, Haskins & Company and had this conversation with Mr. Haskins and Mr. Little about the Hocking catastrophe? A. Yes.

Q. And by that time the stock had dropped to what? A. It had dropped to—I don't remember—81, and it got down, before the day was over, 36, I think; I cannot remember it; considerably less.

Q. And when you went there, you asked Mr. Kilborn to go with you or did he ask you to go with him? A. I think he suggested that we go.

607 Q. You thought the situation was a very alarming one? A. Yes.

Q. And called for immediate action on the part of the bank in order to protect itself? A. Certainly.

Q. That is, in order to get what it could on what it claimed to be due? A. I wish you would say it again.

608 Q. And you wanted to get as much as you could in either money or securities from Lathrop, Haskins & Company at the earliest possible moment on what they owed you? A. We wanted to see ourselves that their obligation would be taken care of.

Q. Or paid? A. Yes.

Q. Or secured? A. Yes.

Q. At the earliest possible moment? A. Yes.

Q. And it was an urgent matter, calling for immediate action? A. Yes.

Q. Who called your attention to the drop in Hocking? A. I noticed it on the ticker.

Q. You were watching the ticker? A. Yes. I happened to be in there and someone spoke of it.

Q. You knew that Lathrop, Haskins & Company

was heavily interested in it? A. I knew that that was 609 one of their specialties.

Q. Did they tell you that a petition in bankruptcy was about to be filed against them? A. No.

Q. Did anybody tell you that? A. No.

Q. Did anybody tell you that a receiver had been applied for? A. Yes, but he had not been appointed.

Q. Who told you? A. I cannot say that; it was one of the firm.

Q. Before you left there? A. This was during the time that they told us that a gentleman was coming 610 for consultation with them at that time.

Q. That is before or during the first hour's wait? A. Yes.

Q. While you were waiting there during the first hour they said that an application was being made to the court to appoint a receiver of the firm? A. Yes, sir.

Q. And it had not yet been granted? A. It had not yet been granted.

Q. That is, a receiver of the assets and property of 611 the firm? A. I don't know.

Q. What else did they tell you about this receiver, the application for whose appointment was then pending? A. I don't recall that they told me anything.

Q. More than that? A. More than they merely mentioned that there would probably be a receiver or an assignee appointed, and he had not yet been appointed.

Q. And this receiver, you understood to mean a receiver appointed by the court or a judgment under 612 some legal proceeding? A. Yes.

Q. A bankruptcy proceeding? A. Not necessarily.

Q. Or an assignee if they had made a general assignment? A. Yes.

Q. What did Haskins or Little say to you their financial condition was? A. Very little was said of the firm's condition; there was a great deal of excitement and the principal topic of conversation was their suspension and after that, Mr. Little said that he was

613 a ruined man. He had speculated in securities and was wiped out.

Q. Did they say that Lathrop, Haskins & Company was wiped out? A. I don't know whether they did or not. I don't remember that they did.

Q. Will you say that they did not? A. I would not want to make a statement of that sort.

Q. Didn't either Little or Haskins say that both Little and Lathrop, Haskins & Company were wiped out financially because of the transactions in Hock-  
614 ing? A. I cannot answer that just that way; I cannot say.

Q. Did they say how much they owed or how much their assets were? A. No, they had no figures.

Q. You have testified about this day or clearance loan. Do you remember Lathrop, Haskins & Company asking for that loan of \$200,000 the day before, on January 18? A. On January 18?

Q. Yes, of the National City Bank on collateral? A. I don't remember that.

615 Q. And the bank refused it? A. I don't remember it.

Q. You would pass on that, or somebody else? A. No, that would not come to me.

Q. Who would pass on that? A. They may have asked the loan clerk or one of the officers.

Q. Who was the loan clerk on January 18? A. C. T. Barnes.

Q. What other officer had charge of the making of loans on collateral to Lathrop, Haskins & Company?  
616 A. Mr. Kilborn.

Q. You are familiar with the law against over-certification by National banks, aren't you? A. Yes.

Q. And you know that it is contrary to law to certify checks drawn by a depositor unless the money is actually in the bank; isn't that the law? A. Unless the money is to his credit on his account.

Q. Yes; unless he has a deposit to his credit in the bank for which the checks are certified; that is the law, isn't it? A. You are not allowed to certify a

check for an amount more than stands to the credit of 617 the customer on the books.

Q. And in order that Lathrop, Haskins & Company might have checks certified, you made these loans each day to them ? A. Yes.

Q. You have testified to it ? A. Yes.

Q. And they were actual *bona fide* loans ? A. They were not ; they are what we call clearance loans, made for the purpose of clearing the transactions of the day before.

Q. But was there any difference, as a matter of fact, 618 between that and any other loan ? A. A great difference.

Q. Do you mean to say that they were not real loans ? A. They were clearance loans.

Q. Were they not real loans of money ? A. They were loans of credit for special transactions.

Q. When they came in in the morning and they gave you—and they said they wanted to borrow \$300,000, didn't you credit their account with the \$300,000 if you gave them the loan ? A. Certainly. 619

Q. Wasn't that exactly the same way if they came in with collateral and borrowed the money, didn't you credit their account, Lathrop, Haskins & Company's account with your bank, with the \$300,000 or \$500,000 in exactly the same way ? A. Yes.

Q. Wasn't it entered in their pass book as a credit ? A. Yes.

Q. And the money was actually to their credit in their account just the same as in every ordinary loan ? A. Yes. 620

Q. Otherwise, it would be contrary to law, wouldn't it ? A. Yes.

Q. And, of course, you didn't do anything contrary to law ? A. No.

Q. Now, Lathrop, Haskins & Company drew their checks to anybody they pleased against their balances ; is that right ? A. Yes.

Q. And your bank certified those checks up to the amount in full of their actual cash deposits, up to the amount of what you credited them with by reason of

621 this loan? A. Up to the amount of the credit of that loan, pending the receipt of their deposits.

MR. ELKUS: I move to strike out "pending the receipt of their deposits".

THE REFEREE: Answer it.

A. Up to the amount of the credit of this large loan pending the receipt of their deposits for securities delivered which had been negotiated—closing transactions of the day before.

Q. Did you know what their transactions were of the day before? A. Only in a general way. They told us.

Q. They would say that they wanted so much money to clear? A. Yes.

Q. They wanted a day loan of so much cash? A. Yes, to clear their loans.

Q. And that is all they told you; they didn't tell you what the loans were or what securities you were 623 going to get, did they? A. They did not.

Q. And all you knew was that they wanted so much money and you either gave it to them or didn't? A. Yes, sir.

Q. Now, they had until three o'clock of the day on which you made them the loan to make deposits to meet it, didn't they? A. We would not allow it to run to three o'clock to make the first deposit, Mr. Elkus.

Q. What do you mean by the first deposit? You mean that they had to deposit \$50,000 or \$25,000 or 624 \$100,000? A. The deposits have got to come in reasonably early, from half past eleven to 12 o'clock, to see the certification sheet nearly balanced.

Q. You mean to say that you watched their balances to see whether or not they were having certified too much money without making deposits? A. We watch all such accounts.

Q. But, as a matter of fact, you expected to and did certify before the deposits were made? A. There would be no need of the day loan otherwise.

Q. So they drew out the money into these day loans 625 before they made the deposits ? A. Naturally.

Q. And then they had—you could not call on them for the loan, to make it good, before the end of the day, could you ? A. Yes, I certainly could and certainly did. If the deposits are not made early, we want to know why and we always called them up. In this particular case the deposits were made and they had been coming down early.

Q. In this case you were not alarmed because the deposits were being made ? A. Yes. 626

Q. If the deposits are not sufficient to pay the loan, they pay it at three o'clock ? A. Yes.

Q. And this method is done to get around the law of over-certification ? A. I won't say that.

MR. GARVER : Objected to as incompetent.

A. It is done to comply with the law and to facilitate business ; it has been customary for years.

Q. Let us put it in this way : Before you inaugurated 627 the practice, you used to simply over-certify checks ?

A. All banks do the same for stock exchange houses ; that is, generally the same.

BY THE REFEREE :

Q. And this is a substitute for that ? A. This is a substitute for that.

Q. And you accomplish the same thing ? A. Yes.

BY MR. ELKUS :

628

Q. When you were at the office of Lathrop, Haskins & Company, did you or Mr. Kilborn tell them that if they didn't make good that clearance loan or give them security that this would end the practice or something of that kind ? A. I don't think it was like that. That is a pretty broad statement to make.

Q. Did you say or did Mr. Kilborn say in words or substance that he had been one who had been in favor of this practice, but that if this loan was not made

629 good, that he would stop the practice? A. I cannot testify to that.

Q. You don't know whether it happened or not?  
A. I don't recall that.

RE-DIRECT EXAMINATION BY MR. GARVER:

Q. You stated, in answer to a question by Mr. Elkus, that these day or clearance loans were made to clear the transactions of the day before. What do 630 you mean by that?

MR. ELKUS: Objected to as incompetent, irrelevant and immaterial and calling for a conclusion.

A. A stock exchange house sells stock and bonds to-day for delivery to-morrow. The bonds and stocks are in loans in other banks. To enable them to take the stocks and securities out of these loans, they have to be paid for with a certified check. The volume of the 631 transactions is very large at times, and it is necessary for them to have assistance from their respective banks to enable them to clear these securities.

Q. That is, to take out of the loans those which they have sold? A. Those which they have sold and make new loans and get the checks for the securities as they deliver them. These checks are then deposited to take care of these clearance loans.

MR. ELKUS: Now, I move to strike out the 632 answers of the witness to the last two questions on the grounds that they are hearsay and incompetent and irrelevant and immaterial, and don't apply to this particular case.

Q. So that, as I understand the transaction, these clearance loans are obtained by stock exchange houses for the double purpose of paying for stocks or bonds which they had bought the previous day, and which were deliverable on the day of the loan, and obtaining the release of securities which they had previously

hypothecated, and which they require for the purpose **633** of delivery on the day of the loan ?

MR. ELKUS : Objected to as incompetent, irrelevant and immaterial ; also as hearsay and not binding on this complainant, and absolutely outside of any issue in this case.

Objection overruled ; exception for Mr. Elkus.

A. Yes.

**634**

Q. And, in answer to a question by Mr. Elkus, you also referred to the fact that these day or clearance loans were different from other demand loans. These day loans are payable on demand, are they not, according to the exhibits 11 and 12 ?

MR. ELKUS : The same objection.

Objection overruled ; exception for Mr. Elkus.

A. Yes.

**635**

Q. Did you ever, as a matter of fact, make formal demands for the payment of the loans, of these day or clearance loans, in the ordinary course of business ?

MR. ELKUS : The same objection.

Objection overruled ; exception for Mr. Elkus.

A. No.

Q. And what did you mean when you stated that **636** you would call the attention of the borrower to it if the deposits did not commence to come in by 11:30 ?

MR. ELKUS : I object to that as calling for a conclusion and as hearsay.

Objection overruled ; exception for Mr. Elkus.

A. We endeavored and wanted these loans liquidated as promptly as possible. A great many cashiers

637 in brokers' offices, if we would allow it, would hold all of the deposits to the last of the day, because it would be more convenient to them, and we want these out of the way, and our idea is to have these deposits made promptly and early, and have the thing cleared up in the shortest possible time—in the least possible time.

Q. And had that been the general conduct of the business, that their deposits would commence to come in as soon as they began to make their clearances?

638 MR. ELKUS : The same objection.

Objection overruled ; exception for Mr. Elkus.

A. Yes, sir. There was never any trouble with them. They were always very prompt.

Q. So that in the course of dealing with Lathrop, Haskins & Company, their deposits had always commenced to come in at the time when their deliveries would be made?

639

MR. ELKUS : The same objection.

Objection overruled ; exception for Mr. Elkus.

A. Yes, sir.

Q. And that had been the uniform course of business with them, hadn't it?

MR. ELKUS : The same objection.

640 Objection overruled ; exception for Mr. Elkus.

A. Yes.

Q. In obtaining these day or clearance loans from the bank, do the stock exchange houses who get them state that they want to have them for this purpose?

MR. ELKUS : Objected to as incompetent, irrelevant and immaterial.

Objection overruled ; exception for Mr. Elkus.

A. They are given a line on which they can call for, 641 say daily, on the distinct understanding of what I have stated, for what they are used for. In the case of some large transactions, we have been called up and they state that they will need an additional line for special transactions, naming them, and occasionally, we have, as in this case, we have granted them a little extra line. This \$200,000 was a special request.

MR. ELKUS : I move to strike the answer out 642 as not responsive and as incompetent, irrelevant and immaterial, and also as hearsay.

Motion denied ; exception for Mr. Elkus.

Q. Well, every demand loan that is not made for clearance purposes is secured, is it not, by collateral ?

The same objection ; objection overruled ; exception for Mr. Elkus.

643

A. Secured by collateral.

Q. And has it been the uniform practice in the case of these clearance loans with all of the stock exchange houses that you have mentioned, that a new loan is made each morning and is paid off at or before the close of business each day ?

MR. ELKUS : Objected to as incompetent, irrelevant and immaterial, and what anybody's uniform practice is immaterial.

644

Objection overruled ; exception for Mr. Elkus.

A. Yes.

#### RE-CROSS-EXAMINATION BY MR. ELKUS :

Q. Isn't it a fact that Lathrop, Haskins & Company frequently had \$500,000 a day ? A. No, \$300,000 was their line.

**645** Q. Didn't they ever have \$500,000 ? A. I will not say that they never had it, but I don't remember that ; if they ever had it, it was an exception, whenever they would ask for anything additional.

Q. That was an alarming thing in itself ? A. No, not exactly ; when everything was normal and they would explain that they wanted it, for a little while, for special transactions, there was nothing alarming about it.

Q. And they explained to you that they wanted this **646** \$200,000 for special transactions ? A. They said their demands were a little heavier to-day and they wanted it for that purpose.

Adjourned to Tuesday, April 11, 1911, at 3 P. M. ; also to Thursday, April 13, 1911, at 3 P. M.

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NEW YORK, May 11th, 1911.

**647** Met pursuant to agreement.

Present : THE REFEREE, MR. ELKUS, MR. McGuire,  
MR. GARVER.

HENRY R. CARSE, being duly sworn and examined as a witness for the defendant, testifies as follows :

BY MR. GARVER :

**648** Q. What is your occupation ? A. Vice-President of the Hanover National Bank.

Q. Of this City ? A. Yes.

Q. How long have you been connected with the Hanover Bank ? A. Since 1886.

Q. You have been an officer of the bank for how long ? A. Since 1901.

Q. Does the Hanover Bank make what are called day or clearance loans to stock brokers ? A. Yes.

Q. How long has it been making such loans ? A. Since 1897.

Q. Will you state generally how such loans are 649 made and the course of business in relation to them?

MR. ELKUS: Objected to as immaterial and irrelevant and not affecting the issues in this case, and incompetent.

Objection overruled.

Exception.

A. The broker, in the morning, figuring up the amount of stocks or securities he has to pay for, or 650 the loans that he has to turn over, makes up a demand note for a round amount, and sends it up to our loan desk with his pass book; we make a loan for the amount, enter it in the pass book and credit it on the ledger; a memorandum of this amount is made on the certification book, together with the amount of balance to the credit of the account at the opening of business, and from time to time during the day any deposits that are made for the credit of the account; and against such credits we certify checks that are 651 presented during the course of the day by the broker. When the day's work is cleared up the broker sends up a check to the loan clerk for the same amounts as the notes; we stamp the note "Paid", and return it to him, and the check going through the books as a charge, offsets the credit that was made on the loan in the morning.

Q. Is that process repeated each day?

Same objection, ruling and exception.

652

A. It is repeated each day.

Q. With each stock exchange house that you do business with? A. With each stock exchange house that we do business with.

Q. About how many different stock exchange houses do you do business with on the average, every day?

Same objection, ruling and exception.

A. We have about 75 stock exchange houses; stock

**653** exchange accounts ; all of them do not ask such accommodation every day.

Q. Does that run up into a good many million dollars every day ?

Same objection, ruling and exception.

A. It runs in ordinary times about ten million dollars a day.

**654** Q. How do these clearance loans differ from other loans, other demand loans made by the bank ?

MR. ELKUS : Same objection, and as calling for this witness's information as to his own bank, and therefore is not proof of any custom, and therefore is immaterial, irrelevant and incompetent.

Objection overruled.

Exception.

**655** A. Do you mean demand loans made to Stock Exchange houses ?

Q. Yes. A. The rule is that loans are not made to Stock Exchange houses without collateral. The nature of their business is such that the thing which is paid for with the money which is loaned them is in shape to deliver to the lender, and so the lender requires it in the form of securities as collateral ; so that on ordinary loans to run for any length of time they are always secured by collateral. In the case of these loans, as the collateral is in transit—that is to say, the broker has to deliver it to some one else to get the money to repay the loan, it has developed a form of trust, and the clear understanding between the broker and the bank is that whatever the broker obtains by the proceeds of the loan given to him is held in trust for the account of the bank, and is to be accounted for during that day, it being clearly understood that in no case shall this accommodation run beyond the day on which it is granted. If a broker pays for stocks or bonds it is the understanding of the bank that they belong to them as collateral to their loan, and the broker simply

retains possession of them long enough to make delivery and get payment ; if the proceeds of the credit are used to pay for loans which are already secured by collateral the bank expects that collateral to be placed in another loan, which might either be made with them or with some other institution, and the proceeds of that loan would pay for this temporary loan, as we generally call it. These things are known as temporary day loans for the purpose of clearing the broker's business.

657

MR. ELKUS : I move to strike out the answer on the ground that it is not in answer to the question and is absolutely incompetent, and no proof of any custom ; it is testimony of what his understanding is of their agreement with a customer, and of their expectations, hopes, prayers and beliefs.

Motion denied.

MR. ELKUS : I except. It is also incompetent, irrelevant and immaterial.

658

Q. In the ordinary course of business do you ever actually make a demand upon the broker for the payment of those sums before 3 o'clock, or is the loan paid without any demand ?

Same objection, ruling and exception.

A. The loan is paid as a matter of course without any demand being made. Sometimes in the rush of business the cashier of a brokerage house might overlook making his deposits and in such case we would call him up on the telephone, and ask him what was the cause of the delay.

Q. You mean if it got along towards three o'clock.

Same objection, ruling and exception.

A. Yes, sir, if it got along towards two or three o'clock.

**661** Q. Do you expect that when a broker is paid for securities he delivers that he will use those proceeds towards making his account good with you?

Same objection, ruling and exception.

A. That is the clear understanding between the bank and the broker, as soon as the broker receives a check in payment for securities which have been paid for by the use of this credit he shall deposit those checks

**662** with the bank, from time to time, and they are constantly urged to keep sending up their checks, not to wait and hold them until they are all in, but to send them up as soon as they get them in their hands.

Q. What is the ordinary custom of business when the checks are deposited as soon as the deliveries begin to be made?

**663** MR. ELKUS : Objected to as immaterial, irrelevant and incompetent ; not the proper way to prove custom, and no proper foundation laid for it.

Objection overruled.

Exception.

A. It is the custom and the brokers make many deposits during the course of the day.

MR. ELKUS : I move to strike out on the same grounds of objection to the question.

**664** Motion denied.

Exception.

Q. Does it ever happen that brokers who obtain these loans bring in before the close of business specific securities ?

MR. ELKUS : Objected to as immaterial, irrelevant and incompetent, and calling for a conclusion, and no proof of custom.

Objection overruled.

Exception.

A. The brokers who do business with them and to whom we grant this special accommodation do borrow regular call money from us, arranging their loans on the floor of the Exchange, the same as other brokers and it is in very rare cases that they bring in collateral which they have not been able to arrange the loans on. The understanding is that they shall pay for these loans with good certified checks, and not by forcing loans on the bank; but there have been cases in times of stress where the broker has not been able to arrange the loans and so he has brought into the bank the securities which were paid for by the credit given to him, and the bank has made him a separate loan on that, and with that loan paid off the temporary loan which had been made in the morning.

Q. This understanding you refer to, is that the ordinary usage and ordinary method of doing business?

Objected to as immaterial, irrelevant and incompetent.

667

BY THE REFEREE:

Q. Do you know anything about the case of any other bank than your own? A. I know that by talking with other bank officers, by conferring and discussing these things, from time to time.

THE REFEREE: He may answer.  
Exception.

A. Yes, sir.

668

BY MR. GARVER:

Q. Do you know generally the extent to which the making of these loans is carried by the banks of New York?

Same objection, ruling and exception.

A. Well, there are about a dozen banks in the neighborhood of Wall Street, and those are the only banks

**669** who can do it, because the banks further away would not be convenient, and some do more of it than we do, considerably, and some do less ; I have never heard any amount, but it must run to rather large sums ; I would not be surprised if it amounted to a hundred million dollars a day.

MR. ELKUS : I move to strike that out as immaterial, irrelevant and incompetent.

**670** THE REFEREE : Yes, strike out that part where he says he would not be surprised.

MR. ELKUS : I except.

Q. In connection with your business as a banker, don't you inform yourself in regard to the character and extent of this business, in your relation with other banks and stock exchange houses ?

MR. ELKUS : Same objection, ruling and exception.

**671** A. We do in a general way, but banks do not tell in detail to others the business they do ; in fact, it is rather against banking ethics to tell to others transactions which they do for their customers.

Q. The National City Bank is the largest bank in the City that does that kind of business, isn't it ?

Same objection, ruling and exception.

A. Yes, sir.

**672** Q. What other banks ?

Same objection, ruling and exception.

A. The Bank of Commerce, Hanover, Mechanics & Metals, Bank of America, the Manhattan Company, Merchants National Bank of New York, and there are some others.

Q. The Bank of Commerce is one of the very large banks of the City ? A. The Bank of Commerce is one

of the large banks, one of the largest banks in the City, 673 and has a very large brokerage business.

MR. ELKUS : I make the same objection.  
Same ruling and exception.

Q. In the general conduct of this particular class of business, do you every day arrange for the specific amount to be loaned to a particular stock exchange house, or do they have general lines which it is recognized they are entitled to receive ?

674

Objected to as immaterial, irrelevant and incompetent.

Objection overruled.

Exception.

A. The different houses who do business with us have general lines arranged which we grant to them without any special arrangement ; if they should have some extra large business going through their office 675 on any particular day they call us up and explain what that business is ; if they should send up an extra large note without calling us up we call them up and ask them for an explanation of what this additional matter is.

Q. Then do they make representations to you before you grant the additional loan ?

Same objection, ruling and exception.

A. Yes, they state what the general transaction is, 676 and as a rule they stand ready to explain all their daily transactions ; in fact a few of the smaller ones list on the back of their notes the transactions which are being covered by the credit.

MR. ELKUS : I move to strike out the answer as immaterial, irrelevant and incompetent.

Motion denied.

Exception.

**677** Q. When a new customer comes in and asks for a loan of this kind is it customary to inquire as to the nature of the clearance which he wishes to make with the proceeds of the loan?

Same objection, ruling and exception.

A. Yes, sir; we have him explain thoroughly what he desires the clearance for, the securities which he is handling and the parties with whom he is dealing.

**678** Q. Do you ever object to such securities, to making loans of this kind on the securities thus specified?

Objected to as immaterial, irrelevant and incompetent, and not proof of any custom.

Objection overruled.

Exception.

**679** A. If the securities which a broker intends to clear are not such securities that we would accept as collateral to a regular call loan, we refuse to grant the accommodation for clearing them, the idea there being that the security for our money is the thing which is being paid for by our credit, and we want to have something that makes that advance secure.

MR. ELKUS: I move to strike out all the answer as irresponsible and immaterial, irrelevant and incompetent and especially that part which begins "The idea there being," as not proof of any custom or any fact.

Motion denied.

**680** Exception.

Q. Suppose you found one of these stock exchange houses using the proceeds of one of these clearance loans for purposes other than making his clearances, would that influence your conduct in dealing with him in the future?

Objected to as immaterial, irrelevant and incompetent; there is nothing in this case about that.

THE REFEREE: He may answer.

Exception.

A. We would stop the accommodation at once, and 681 if this were discovered before checks had been certified we would refuse to certify the checks.

CROSS-EXAMINATION BY MR. ELKUS :

Q. You say you began this certifying of checks against these call demand loans in 1897 ? A. Yes, sir.

Q. And prior to that it was the habit of your bank, was it not, to simply certify checks for more than the customer had on deposit ? A. No, sir ; prior to that 682 time we had not had any of the brokers' business.

Q. Your brokerage business began in 1897 ; prior to that you did not do Wall Street business ? A. It re-commenced in 1897.

Q. When was the interval ; when did the interval of no Wall Street business occur ; how many years or months ? A. That was before my time.

Q. While you were at the bank, prior to 1897, the bank did no Wall Street business ? A. I could not say ; I went on the loan desk in 1897 ; these loans 683 have always been handled on our demand loan collateral desk.

Q. You don't know what happened before you went on the loan desk ? A. I knew—no, I didn't know what happened before, but I know the thing started then.

Q. Do you know what happened before you used to make demand loans and when you were doing a Wall Street business before 1897 ? A. I think the Wall Street business stopped after the failure of the 684 Marine Bank, when the law was passed against over-certification.

Q. Prior to that, prior to the stopping of the Wall Street business, you used to permit your customers to have checks certified for more than there was to their credit ? A. I wasn't in the bank at that time ; that was '84.

Q. Do you mean to say that the bank did no Wall Street business between 1884 and 1897 ? A. I believe not.

685 Q. You have no knowledge of what was being done at that time, between 1884 and 1897 ? A. No, sir.

Q. When a customer of yours sent in his demand loan—demand note, he was credited with the money on his pass book, just the same way as any other demand loan was credited ? A. Yes, sir.

Q. Unless you knew that he was drawing checks and having them certified for some purpose which you did not consider he ought to, the checks would go through and be certified and paid ? A. Yes, but we 686 made it our business to keep track of them.

Q. The customer could draw against his own moneys which were on deposit in addition to demand loan credits, as and how he pleased ? A. Yes, sir.

Q. And the moneys were mingled together ; there wasn't any separate account kept in your books ? A. No, sir.

Q. It was credited to the customer's account just as any other deposit, or the proceeds of any other discount or any other loan ? A. Yes.

687 Q. There was a difference in the way you treated your customers--75 houses—with reference to these demand loans ; there was not a uniform practice ? A. I don't understand.

Q. You said as to some of your customers you required them—or they did place on the back of the note a memorandum of how they were going to use the money ? A. Some of the small—young fellows starting in business.

Q. They put on the back of their demand notes a 688 memorandum of what they expected to do with the money ? A. What they intended to do with the money.

Q. Others did not put any such memorandum on ? A. No, the larger houses did not.

Q. That is what I mean by saying the custom was not uniform, the practice was not uniform ; it was different as far as different firms were concerned ? A. We didn't require them to put it on.

Q. They put it on voluntarily ? A. They put it on voluntarily, showing what their intention was.

Q. You expected and the understanding was that 689 these demand loans should be paid in money or certified check before the end of the day? A. Yes, sir.

Q. And the customer had until the end of the day to pay them? A. Yes, sir.

Q. When you say some of these small stock exchange houses voluntarily put on the back of the note in pencil a memorandum of the transaction, do you mean that you required them or asked them to do it? A. No, sir, but when they started with us and asked this accommodation they were small, did not have 690 much means; from the reports we had they were honorable young men, and we were assisting them, so that we would ask them what they were doing in order to see that they were keeping in the right channels, and in order to save coming up to explain the thing, they would write on the back of the note.

Q. They would say "We are going to take up a loan with another loan" or something of that sort? A. Yes or give the bonds and stocks.

Q. Specify the securities? A. Yes, sir.

691

Q. That they were going to take up with the money? A. Yes.

Q. That was in some of the cases? A. Some small cases.

Q. You say very rarely have any securities come to you, that these transactions in almost every case were paid by money or certified check, that is right, is it? A. That is right.

Q. And in one or two cases in times of panic or stress a customer has brought—has stated he was 692 unable to raise money on some securities which he had? A. Yes, sir.

Q. Whether it was on securities which he took up with the money he borrowed from you, or whether it was other securities you didn't know, and then you made him a loan on those securities? A. We did know because we checked up the stuff with the checks which we had certified.

Q. As near as you could you find out? A. We can find out very closely.

693 Q. He would bring those securities to you in those exceptional cases voluntarily and you would make him a time loan or call loan on those securities as collateral? A. A call loan.

Q. That would be credited to his account? A. Yes.

Q. Then he would draw his check against the account to your order? A. Yes.

Q. And pay the day loan in money or check? A. Yes, sir.

694 Q. So that in every case the loan was paid in money? A. Yes, sir.

Q. And you don't know of a case where the securities were turned in for which the loan was supposed to be made, to you, as security for a loan? A. There was one case.

Q. In all your experience where you did not make a new loan? A. Well, we took the securities and made a loan.

695 Q. I mean there is only one case where you did that; is that right, where you took the securities and made a new call loan? A. That is all I can recall.

Q. There is no case of which you have knowledge where the securities were brought in for which the loan was supposed to be made and those securities simply kept as security, as collateral for a demand loan, a clearance loan? A. No, we made a new loan on those securities and the proceeds of the new loan were used to pay that.

Q. To pay the clearance loan? A. Yes, sir.

696 Q. And of course you would make a new loan on any securities that were good, whether they were the result of the transactions with this day clearance money or not? A. Yes, if we had the funds.

Q. Have you ever heard of the First National Bank? A. Oh, yes.

Q. A very large Wall Street Bank? A. Very large.

Q. You have not mentioned that as one of the banks of which you have knowledge; you don't know how they do business? A. I do not know, but my idea has been that they have not very many Wall Street accounts; only a number of the rather large ones.

Q. Do you know how they treat their customers? 697  
 A. I do not.

Q. You don't know whether they have the same business in demand clearance loans as you? A. I do not.

Q. Or do it in the same way? A. No, sir.

Q. Have you ever seen the demand notes that are used by the various banks for this day clearance business? A. I have seen a number of them; I couldn't say I had seen all of them.

Q. Have you got one of your own forms with you? 698

Witness produces papers.

MR. GARVER: You have also produced a loan agreement?

THE WITNESS: They go together.

MR. ELKUS: I ask to have these marked for identification.

The papers are marked Exhibits A and B for identification, respectively, of May 11th, 1911.

[Printed at pp. 178-181.]

698

RE-DIRECT EXAMINATION BY MR. GARVER:

Q. In your observation do you find that different banks have different forms of these demand loan agreements in connection with the clearance loans? A. Yes, they do seem to be worded a little differently; I don't think there is any great difference in their idea.

MR. ELKUS: I object to this witness passing upon—

THE REFEREE: Strike out the last part, that 700 there isn't much difference in the idea.

Q. So far as your observation and experience extend, do all the various banks that you have mentioned conduct this business in substantially the same way, by making loans in the morning which are paid off before the end of the day?

MR. ELKUS: Objected to as immaterial, irrelevant and incompetent.

Objection overruled.

Exception.

**701** A. I believe they do now.

Q. You referred to the fact that these loans must be paid off before the end of the day; what do you mean by that expression "end of the day"? A. Three o'clock we consider the end of the Wall Street day.

Q. The stock exchange closes at that hour? A. Yes, sir. As a matter of fact most of them are paid off much earlier than that.

**702** Q. In your experience do you find that the checks begin to come in soon after the brokers commence to make and receive deliveries?

Same objection, ruling and exception.

A. Yes, they commence to come in shortly after ten o'clock and many of these loans are paid off at 11 or 12 or 1 o'clock, according to the amount of business.

**703** Q. You spoke of the fact that you made special inquiries in regard to the small brokers with whom you commenced to do business; does that continue until there has been a sufficient course of business between you and the brokers to establish your relations so that you feel it is unnecessary to make inquiries every day?

MR. ELKUS: Objected to as immaterial, irrelevant and incompetent, and not proof of usage or custom, and as leading.

THE REFEREE: He may answer.

Exception.

**704** A. Yes, sir, when the broker has by the conduct of his business established a substantial credit we cease to ask these questions in regard to ordinary amounts.

Q. If there is an extraordinary amount you make inquiry as you have already testified? A. Yes, sir.

#### RE-CROSS EXAMINATION BY MR. ELKUS:

Q. When brokers make deposits to whom you have made these demand clearance loans, these deposits are not labeled in any way? A. No, sir.

Q. You can't tell except by inference or guess 705 whether these checks are received to carry out transactions for which the broker has borrowed the clearance loan money, or not, isn't that so? A. Yes, sir.

Q. And the money as it comes in is of course simply credited to the depositors' accounts? A. Yes, sir.

Q. And the loan is not paid until the broker draws a check for it? A. And if it should happen he did not draw a check we would charge his account.

Q. You would charge his account with the note? A. Yes. 706

Q. But what is usually done is, he draws his check for the loan at the end of the day? A. Yes, sir.

Q. Do you make him pay interest? A. No, sir.

Q. No interest at all on these loans? A. I am sorry to say, no.

Q. You don't care where he gets the money from to pay the loan as long as he gets it; it doesn't make any difference to you whether it comes from the particular transaction which you expect or hope he has borrowed the money for, or whether it comes from other transactions? A. No, sir. 707

BY MR. GARVER:

Q. You can tell that a deposit pertains to the securities collateral to this loan from an investigation of your books if your books show a certification in favor of the broker, and a deposit is received from the broker in the same amount?

MR. ELKUS: Objected to as calling for the 708 contents of books not in evidence and as immaterial, irrelevant and incompetent.

THE REFEREE: The proper way would be to ask if he can tell.

Exception.

Q. Can you tell? A. I don't think so.

Adjourned to Thursday, May 18th, 1911, at 3 P. M.

709

NEW YORK, May 25th, 1911.

Met pursuant to agreement.

Present: THE REFEREE; MR. ELKUS; MR. GARVER.

710

MR. ELKUS: I offer in evidence note and agreement which were produced at the last hearing and marked for Identification. I understood this note and this agreement were the only note and only agreement they used with reference to these transactions which he testified about.

MR. GARVER: My understanding was they had different forms at different times; he may have said this was the only form now in use.

The papers marked A and B for Identification at the last hearing are marked in evidence Plaintiff's Exhibits 14 and 15, respectively, of May 25th, 1911, and are as follows:

711

**Plaintiff's Exhibit 14.**

" \$-----

NEW YORK,

190

On demand for value received  
promise to pay to The Hanover National Bank  
of the City of New York, or order

712

Dollars hereby agreeing that said  
Bank shall have a lien upon all property of the  
undersigned now or hereafter in its possession  
or under its control, as security for any indebtedness  
of the undersigned now existing  
or hereafter contracted, with the right  
at any time to demand additional security,  
and with the right, upon default in  
payment, to sell, without advertisement or notice  
to the undersigned, any or all<sup>1</sup> of the securities  
or property so held, at public or private sale, or  
to otherwise dispose of the same in the discretion  
of any of the officers of said Bank, applying  
the proceeds upon the said indebtedness,

together with interest and expenses, legal or 713 otherwise, the undersigned to be liable for any deficiency.

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### **Plaintiff's Exhibit 15.**

"Know all men by these presents, That the 714 undersigned, in consideration of financial accommodation, given or to be given, or continued to the undersigned by The Hanover National Bank of the City of New York, hereby agree with the said Bank that whenever the undersigned shall become or remain, directly or contingently, indebted or liable to the said Bank for money lent, or for money paid for the use or account of the undersigned, or for any overdraft or upon any endorsement, draft, guarantee or any other 715 claim, or *in any other manner whatsoever*, the said Bank shall then and thereafter have the following rights, in addition to those created by the circumstances from which such indebtedness or liability, may arise against the undersigned, or his, its, or their executors, administrators, assigns or successors, namely:

1. All securities and property then or thereafter deposited by the undersigned with said Bank, as collateral security to any such indebtedness or liability of the undersigned to said Bank, shall also be held by said Bank as security for any other indebtedness or liability of the undersigned to said Bank, whether then existing or thereafter contracted; and said Bank shall also have a lien upon any balance of the deposit account of the undersigned with said Bank existing from time to time, and upon all property of the undersigned of every description theretofore or thereafter left with said Bank

717 for safe keeping, or otherwise, or coming into the possession or under the control of said Bank in any way, as security for any indebtedness or liability of the undersigned to said Bank now existing or thereafter contracted.

2. Said Bank shall at all times have the right to require from the undersigned that there shall be lodged with said Bank as collateral security for all existing liabilities of the undersigned to said Bank, approved securities to an amount satisfactory to said Bank, and upon the failure

718 of the undersigned to keep with said Bank at all times, a margin of securities for such liabilities of the undersigned, satisfactory to said Bank or at any time to comply immediately with the demand of the said Bank for additional approved security, as collateral, or upon any failure to pay on demand any indebtedness or liability due on demand to said Bank, or upon failure to meet any business obligation, or upon any assignment for the benefit of creditors, or act of bankruptcy, whether voluntary or involuntary, by the undersigned, then and in either event all liabilities of the undersigned to said Bank shall, at the option of the said Bank become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

720 It is hereby expressly agreed that a request in writing delivered at Street,

or deposited in the Post Office or in any drop-letter box within the City of New York regularly maintained by the United States Government, enclosed in a post-paid wrapper directed to the undersigned at said address, or delivered to any Telegraph Company at its office in the vicinity of said Bank in the Borough of Manhattan, New York City, for transmission by telegraph, to the undersigned

at said address, shall be a sufficient demand for 721 additional security or for payment of any indebtedness or liability due on demand to said Bank.

3. Upon failure of the undersigned either to pay any indebtedness to said Bank when becoming or made due, or to keep up the margin of collateral securities, as above provided, then and in either event said Bank may immediately, without advertisement, and without notice to the undersigned, sell any of the securities or 722 property held by it as against any or all of the indebtedness or liabilities of the undersigned, at private sale or Broker's Board or otherwise, or may, without notice, discount, collect, compound, compromise, settle, manage and turn the same into cash according to opportunity, at the discretion of any of the officers of said Bank, and apply the proceeds thereof as far as needed toward the payment of any or all of such indebtedness or liabilities together with interest 723 and all expenses (legal or otherwise) of sale or collection, holding the undersigned responsible for any deficiency remaining unpaid after such application. If any such sale be at Broker's Board or at public auction, said Bank may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid said Bank may also apply toward the 724 payment of the said indebtedness or liabilities all balances of any deposit account of the undersigned with the said Bank then existing.

It is further agreed that these presents constitute a continuing agreement, applying to any and all future, as well as to existing transactions between the undersigned and said Bank.

Dated New York, the      day of                  ."

**725** JAMES S. ALEXANDER, being duly sworn and examined as a witness for the defendant, testifies as follows :

BY MR. GARVER :

Q. What is your occupation ? A. Vice-President of the National Bank of Commerce.

Q. How long have you occupied that office ? A. Four years.

**726** Q. Prior to that time were you connected with the Bank of Commerce ? A. Yes, with the exception of a period of nine months I have been with the Bank of Commerce since 1885.

Q. The Bank of Commerce is one of the very large banks in New York City, is it not ? A. Yes, supposed to be.

Q. About what are its average deposits ? A. At the present time about \$140,000,000 net.

Q. Does the Bank of Commerce make what are known as day or clearance loans to stock brokerage houses ? A. Yes.

**727** Q. Are you familiar with that class of business ? A. I am.

Q. How long have you been familiar with that business ? A. I have been in charge, or was in charge of that branch of the business for several years, during all the period of my holding office as vice-president, and previous to that too, more or less.

Q. Will you state generally how such loans are made and the manner in which that branch of the business is transacted ?

**728**

MR. ELKUS: Objected to as immaterial, irrelevant and incompetent.

Objection overruled.

Exception.

A. The accommodation is granted for the purpose of enabling brokers to accept loans and receive securities, and they send a note in the morning of the day on which these transactions are to take place, which note is credited to their account for the purpose of—

Q. Is that a demand note? A. A demand note 729 always; they first draw their checks against the amount of the credit, and use those checks for the purpose of acquiring securities, either in payment of bonds or stocks bought, or in payment of loans, and when these securities are delivered to others, or loans placed elsewhere, the resultant funds are deposited with us, and at the close of that day a check is given to take up the demand loan.

MR. ELKUS: I move to strike out the answer 730 and each and every part of it on the ground the witness is testifying as to facts not within his knowledge, but as to facts he assumes to be true and it is hearsay testimony, and immaterial, irrelevant and incompetent.

Motion denied.

Exception.

Q. Is that true of each loan you make to each customer?

731

Same objection, ruling and exception.

A. The same rule applies to each transaction.

Same motion, ruling and exception.

Q. Is a new loan made each day?

Same objection, ruling and exception.

A. Each day, yes, sir.

732

Same motion, ruling and exception.

Q. And that loan is paid off before the close of business each day?

Same objection, ruling and exception.

A. Yes.

Same motion, ruling and exception.

733 Q. Without any formal demand by the bank for its payment?

Same objection, ruling and exception.

A. Yes, and I might state if through oversight, the loan is not paid, there is a clause in the note which makes it payable to the bank, and is immediately charged to the account of the maker under that clause, so these notes are limited in one way or other to overnight accommodation, either by taking them up by check—which simply puts them back into the possession of the maker—or by charge to the account; the holding of the note is a voucher.

Same motion, ruling and exception.

Q. Do you have any recognized lines in the case of different stock exchange houses as to the amounts which they are entitled to, without specific inquiry?

735 Same objection, ruling and exception.

A. Based on their average daily requirements, and then it is customary for them to confer with us if they want larger amounts.

Same motion, ruling and exception.

Q. Do you in such cases where they run over the average amounts ask for any explanation as to why 736 they require additional loans?

Same objection, ruling and exception.

A. Usually that is the ordinary thing, requiring them to call up; but a firm might be of such high standing and such large financial resources we might not care to go into the details. With other firms we would ask if possible what securities they were going to receive and to whom they were to be delivered, the object being, of course, to know that such

securities are what we would care to make an over-night loan against. 737

Same motion, ruling and exception.

Q. Suppose a new stock exchange house should apply to you for accommodation over night, would you make inquiry as to what they expected to do with it?

Same objection, ruling and exception.

A. When we took on the new account we would go very thoroughly into the whole question and inquire as to the membership of the firm and amount of capital in the business and the character of the business they proposed to do, whether commission business or standard securities, etc. 738

Same motion, ruling and exception.

Q. You would want to know the character of securities in which they dealt? 739

Same objection, ruling and exception.

A. Yes, that is the vital thing, because we are making the advance to put them in possession of these very stocks; if they couldn't deliver they might have to come back and deposit the securities with us; it might be a forced over night loan and we would want to know whether they were such collateral as we would loan on. We would not know the securities they had acquired were securities we would be willing to loan on. 740

Same motion, ruling and exception.

Q. In other words, if it were a forced loan you would insist on having such securities as you would have for a loan secured by collateral in the ordinary course?

Same objection, ruling and exception.

741 A. Exactly ; we are looking to the collateral back of these day clearance notes to the same extent that we are looking to the collateral back of our overnight loans ; the basis in the bank is exactly similar.

Same motion, ruling and exception.

Q. Exactly similar to what ; to the overnight loans ?

Same objection, ruling and exception.

742 A. Exactly.

Same motion, ruling and exception.

**BY THE REFEREE :**

Q. You look to their securities as your security ?  
 A. Yes ; in one case we have the securities in possession and the other case we have not.

**BY MR. GARVER :**

743 Q. In either case you depend on the good faith of the brokers ?

Same objection, ruling and exception.

A. That is right, yes, sir, to turn them over to us or the avails of them.

Same motion, ruling and exception.

744 Q. That is, you permit the brokers to take—

MR. ELKUS : I don't think you ought to lead about this ; let him testify to what he does.

A. If you want to know how they clear the loans I will tell you. Here is a concern has a loan with the First National Bank of \$100,000 and the First National Bank calls the loan ; they bring their note to us for \$100,000 and we credit their account ; we certify their check to the order of the First National Bank for \$100,000 and interest on the loan, whatever it may be ;

they take this check to the First National Bank and receive back their note and collateral, which is the value of \$120,000 and such collateral as the First National Bank would be willing to loan against ; they seek in the market for another place to place that loan and they may put it with the Manhattan Company and deposit it with a new note, and get the check of the Manhattan Company and deposit it with us.

Same motion, ruling and exception.

746

BY THE REFEREE :

Q. If they don't do that what becomes of the securities ? A. If they couldn't find anybody else to loan on the securities they would have to bring them to us and we would have them as collateral to a temporary advance which we make. On some of these securities perhaps the loan may not have been called ; they may have sold a good many securities out of these and rather than—they might make a new loan of \$50,000, an additional \$50,000 of collateral, for sales previously made, and we would look to receive the new loan check for \$50,000 and the avails of the other \$50,000 of securities sold.

747

BY MR. GARVER :

Q. Suppose you discovered the Stock Exchange House to whom you had made such a loan had used the proceeds for some other purpose, what would you do ?

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MR. ELKUS : Same objection and on the further ground it is purely speculative.

Objection sustained.

Q. How many different stock brokers do you have such accounts with ? A. About 100.

Same objection and motion and same ruling and exception.

**749** Q. Can you state about what is the extent of these loans on a daily average?

Same objection, ruling and exception.

A. It depends largely on the activity of the securities market.

Q. Take it from one year to another?

Same objection, ruling and exception.

**750** A. From around fifteen million dollars a day and upwards; I suppose the average would be higher than that.

Same motion, ruling and exception.

BY THE REFEREE:

Q. How many banks in the City do this business?

A. I can't answer that.

**751** Q. Can you approximate it; I suppose the proximity of the banks to Wall Street has something to do with it? A. Yes, sir, that is an important element; the City Bank, the Hanover, the Mechanics & Metals, the Manhattan Company, the Merchants do some; I presume there are a number that do.

BY MR. GARVER:

Q. The Bank of New York? A. Yes.

Q. And Seaboard? A. Yes.

**752** Q. Did you mention the Bank of America? A. The Bank of America does some of that business.

Q. Why do you say proximity to Wall Street is essential?

Same objection, ruling and exception.

A. Well, a very small bank would scarcely go into that class of business, and on the other hand when transactions are heavy I think that it would be impossible to make the deposits and have checks certified

promptly, and to carry out the routine that goes with 753 that business.

Same motion, ruling and exception.

Q. The transfer of securities from one place to another, it all has to be done in some short space of time?

Same objection, ruling and exception.

754

A. We couldn't go way uptown; if a broker gave checks on an uptown bank it would force him out of business; they couldn't send them up there to have them certified.

Same motion, ruling and exception.

Q. It would be more difficult to make transfers of securities from one bank to another if they were separated?

755

Same objection, ruling and exception.

A. Yes, I presume some of the smaller uptown banks carry demand loans downtown, but they have collateral for them with the downtown banks; that is the custom of the downtown banks that follow that feature of the business; otherwise they couldn't get the brokers' accounts; the brokers wouldn't keep them with them.

756

Same motion, ruling and exception.

Q. The banking hours in New York are from 10 to 3? A. Yes.

Q. That is the time the Stock Exchange opens? A. Yes.

Q. At what hour of the morning are day clearance loans usually made?

Same objection, ruling and exception.

**757** A. They send them up about half past ten ; sometimes even later ; a loan might be called in the middle of the day when the broker had not expected it, and he might have to send up the loan for that purpose in the middle of the day.

Same motion, ruling and exception.

Q. Ordinarily ?

**758** Same objection, ruling and exception.

A. Early in the morning.

Same motion, ruling and exception.

Q. How soon do the deposits begin to be made by the borrower ?

Same objection, ruling and exception.

**759** A. We try to have them made as quick as possible ; sometimes a broker would rather keep them on his desk than keep them in the bank ; we have to tell them more or less constantly to hurry up their checks ; they make them all through the day.

Same motion, ruling and exception.

Q. Do you have some supervision of the deposits to see whether they are coming in ?

**760** Same objection, ruling and exception.

A. Yes ; the certification clerk keeps the run of every account, every certification account all through the day ; he knows exactly how they stand.

Same motion, ruling and exception.

Q. Do you know whether the different banks you have referred to who are engaged in this particular class

of business have different forms of obligation which 761  
are used?

Same objection, ruling and exception.

A. I can't answer that question from knowledge of the forms they use; I don't think they have uniform forms; I believe all of them have some form.

Same motion, ruling and exception.

Q. So far as you know the method of conducting the business is the same in the different institutions? 762

Same objection, ruling and exception.

A. There is a form employed of conducting the business, and these forms of notes are probably all drawn with the idea of setting forth more or less the conditions of the business.

MR. ELKUS: I move to strike out what is 763  
probably done.

THE REFEREE: Strike it out.

Q. So far as your observation extends, do you know any bank where these clearance loans are made, where they are not paid off the same day, no matter what the form of the written obligation may be?

MR. ELKUS: Objected to because the witness is not shown to have any knowledge on the subject. 764

THE REFEREE: You better ask him whether he knows the custom.

A. I know there is just one way of doing the business, and I know why the business is done, because it cannot be done without those temporary accommodations, and that is the reason the business exists; if the brokerage business could be conducted without it there would not be this certification.

765

MR. ELKUS: I move to strike the answer out as immaterial, irrelevant and incompetent.

THE REFEREE: It is only a matter of opinion; I will strike it out. Any fact the witness knows about the usage of any bank he may state.

Q. You say you have been in the banking business for about quarter of a century and you are brought into frequent contact with other bankers in connection with the business?

766

Same objection, ruling and exception.

A. Yes.

Q. You are familiar generally with the manner in which the banking business is conducted by different banks?

Same objection, ruling and exception.

767

A. Yes.

Q. You frequently confer with other banks and bankers in regard to banking business and business conditions?

Same objection, ruling and exception.

A. Yes.

Q. Don't you know as the result of your experience and of this familiarity with the banking business and the constant contact in which you come with other bankers, the general method employed by the different banks in making these clearance loans?

MR. ELKUS: I have no objection to his being asked if he knows, but not the result of anything.

THE REFEREE: If he knows how the business is done by other banks he may state. They all make these day loans and the agreement is that they are to be paid off during or at the close of the day; the method by which they arrive at

that result is a matter of detail of each bank, I 769 suppose.

MR. GARVER : In spite of the fact that it is a demand obligation the demand is never made ; it is paid off as a matter of usage.

CROSS-EXAMINATION BY MR. ELKUS :

Q. You don't know anything about the way any other bank conducts its business ; you are only familiar with your own methods ? A. You mean from 770 experience ?

Q. From knowledge ? A. From actual operation ?

Q. Yes. A. Of the interior of the various other banks ?

Q. Yes. A. My actual experience in the interior has been with the Bank of Commerce alone.

Q. Do you know, for instance, that in some one or more of the banks the form of note which is taken specifies certain securities which the maker of the note agrees to hold for the loan. A. No, I don't know that. 771

Q. Haven't you ever seen a promissory note, the form of note used in this business by the First National Bank ? A. No, sir.

Q. You know of the First National Bank ? A. I have heard of it.

Q. A very large bank in Wall Street ? A. Do you want me to answer that ?

Q. Yes. A. I know I have heard of the First National Bank ; as far as its size and so forth are concerned do you want me to quote figures ? 772

Q. Yes, is it a big bank ? A. Yes.

Q. Its deposits are in the millions ? A. Yes.

Q. It is not quite as large as the National Bank of Commerce, but almost ? A. It depends on how you look at figures ; it is not as large as the Bank of Commerce.

Q. Is it nearly as large ? A. Several millions less.

Q. It is an old established bank ? A. It is, yes, sir.

Q. Now your bank makes loans on demand notes,

773 that is loans payable on demand, where the securities are deposited with the bank, doesn't it? A. It does.

Q. And those loans are callable at any time the bank desires the money? A. Yes.

Q. And the specific securities are pledged with the bank and in its actual possession to secure those loans?

A. Of course they are over night loans; you are not supposed to call them the day you make the loan.

Q. You can legally? A. I don't know about that.

Q. The loans you have been speaking about as day 774 or clearance loans, have you got the form of note which your bank uses? A. No, sir.

Q. Have you any agreement which you exact from your customers for them? A. We use only the note.

Q. Have you read the note brought here by Mr. Carse of the Hanover Bank? A. No, sir.

Q. (Handing witness paper.) Will you look at it and tell me if your bank has a note in the same, or different form; I refer to Exhibit A? A. Our form is a little different.

775 Q. Can you tell me in what way it differs? A. Well, it is amplified; there is more in it; this embodies I think the essential features.

Q. Will you be kind enough to send to the Referee a copy of your note, or will you send me one? A. I have no objection; I don't know whether anybody else has or not.

Q. The way this business is done by your customers is to simply send in a printed note signed by them, with the amount which they want; is that the beginning of the business? A. Yes.

Q. And then if the customer is a good one, or old one, and that is the amount to which you know he is entitled, you simply credit his account with that amount of money? A. Well, I wouldn't say that; I wouldn't say at the beginning of the business I understand—

Q. At the beginning of the day's business? A. Of course we have an understanding with these people.

Q. I don't want the understanding; after a note comes in from one of your regular customers in the

morning for several hundred thousand dollars we will 777 say, you credit his account in your books with that sum ? A. Yes.

Q. And that is added to whatever sum may be credited to his ordinary account and carried over from the day before or as a balance at that time ? A. Yes, sir.

Q. And the moneys so far as your certification clerk or your other clerks or cashiers are concerned, that money is available to the customer by his simply drawing a check against it ? A. Well, now, for certifi- 778 cation or for withdrawal of cash ?

Q. For certification, we will say ? A. Not for withdrawal of cash ?

Q. For certification ? A. Yes.

Q. Suppose a man draws a check for a thousand dollars and asks to have it cashed, would you refuse it ? A. If it was drawn against the amount credited in that day clearance loan.

Q. Suppose a man had \$25,000 balance and you gave him a credit for \$300,000, and he drew a check for 779 \$26,000 and asked to have it cashed, would you refuse it ? A. You are asking what I would do in a suppositional case ; yes, I should on general principles.

Q. You would refuse it ? A. Yes, or hold it up until some satisfactory explanation.

Q. Suppose he said he wanted the money to buy stocks with ? A. We don't do business that way.

Q. He would have to say what in order to satisfy you ? A. Yes. I might require him to make a deposit.

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Q. You might require it ? A. Yes.

Q. Would there be any case where you would permit him to draw that check ? A. I would not permit any man to draw cash against a credit of a certification note.

Q. He could draw a certified check for \$26,000 without any trouble and have it cashed ? A. Yes.

Q. And he could draw the whole \$300,000 in the ordinary way as long as he drew it by certified checks,

781 or ordinary checks deposited in some other bank ? A. Yes.

Q. He would not have to specify what purpose he wanted the cash for at all ? A. No, sir.

Q. Do you ask him each day "What securities are you going to buy with this money" ? A. No.

Q. Do you ask what loans he is going to pay off ? A. No.

Q. You haven't any knowledge or information on the subject at all ? A. No, sir.

782 Q. And that is the way you do business ? A. That is the way we do business.

Q. That is the custom of the business ? A. Yes.

Q. You hope and expect and believe that before the day is over he will pay back by certified checks being deposited in your bank the amount of the day or clearance loan ? A. No, I won't say that.

783 Q. In some cases you said that you permitted your customers, according to their financial means and their standing, to increase the amount which you had fixed they could get as a day or clearance loan, without any other explanation or question ; that is simply because of their financial standing ? A. The fixing of the line is not a very important thing except to give some working basis ; that is all.

Q. I mean that you draw a distinction ; I want to ask if that is what you mean, that there are some people who could ask for a much larger sum one day, or sum beyond what you had fixed as the line without having to explain, but the others would have to explain ? A. Yes.

Q. Is that right ? A. Others might have to explain, and we would ask an explanation in certain conditions of the stock market, and at other times we would not.

Q. Haven't you any rule about the whole thing at all, as to that ? A. It is not a cut and dried business.

Q. It depends on the condition of affairs ? A. Yes.

THE REFEREE : The rule is, I suppose, the broker has to do what the bank wants.

Q. You make loans, demand loans, where you have 785 the securities over night? A. Yes, sir.

Q. That is, they are supposed to pay them over night? A. Yes.

Q. Has there been any case in your experience where the loan was not paid during the day? A. Just one case that I can recall, yes, sir.

Q. How long ago was it? A. Three or four years ago.

Q. In that case the man couldn't pay; did he pay the next day? A. That was a mistake on his part 786 and he locked up his securities, and through some error in his delivery sheet we thought his account was covered, and it wasn't.

Q. He locked up his securities? A. He locked up his securities in his vault.

Q. And the next day he paid it? A. I got a trust receipt that night for the securities he had in the vault; then I made him a regular loan against the particular trust receipt, and cleaned up that day loan.

Q. When by three o'clock he had not paid—? A. I 787 don't remember the hour.

Q. Was it after banking hours? A. I don't know what time the banking hours were; a man doesn't always get his deposits in the bank before three o'clock.

Q. Was it after three o'clock? A. Yes.

Q. Was it after four o'clock? A. I wouldn't undertake to answer because I don't recollect the hour; when I say I can't remember that ought to suffice.

Q. In this particular case you say a man had not made his loan good by three o'clock, and he had 788 locked the securities in his vault; do you mean by that that he had a time lock on his vault and he could not get at them until the next day? A. I didn't say anything about a time lock; I didn't examine into that.

Q. Why didn't you get the securities themselves? A. Probably he had them in the safe deposit box.

Q. Couldn't he get in the safe deposit box? A. He said he couldn't.

Q. He gave you a trust receipt? A. Yes.

Q. Specifying certain securities? A. Yes, sir.

789 Q. And the next day did he give you a check? A. Sent us the securities if I remember rightly.

Q. Did you make him a loan? A. I made him an overnight loan with interest; day loans do not carry interest and I wanted to get the one day's interest.

Q. When you found he had not paid by three o'clock you called him up or communicated with him and got him to execute a promissory note in the form that you use for call loans with securities pledged with the bank; is that right? A. I didn't say so; we don't use 790 a form for demand loans; we make them under agreement.

Q. Take it in this particular case? A. We made him an overnight loan.

Q. Where the securities are supposed to be in the possession of the bank? A. Yes.

Q. As you could not get the securities because he had locked them up in the safe deposit vault you got a trust certificate? A. Yes.

Q. Or trust receipt? A. Yes.

791 Q. Which was a paper in which he stated he held them in trust for you? A. Yes.

Q. You were not willing to let him keep those securities under the day loan; you didn't consider it safe? A. A day loan doesn't draw interest, and I wanted to put it through the loan department and get that one day's interest on general principles; it wasn't because I didn't feel safe; I didn't feel unsafe that I remember.

Q. You wanted it in that form on general principles; is that the only case you know of in your 25 years' experience? A. That is the only case I have any recollection of.

Q. When did you begin doing this business of making these day clearance loans; what year? A. I can't answer that question.

Q. Were you in the bank before the law was changed when you used to allow the brokers to have their checks over certified? A. Yes, I was a clerk in the bank when the term "certified" was changed to "accepted" in order to avoid the matter of over-certification.

Q. You used to permit a broker to have his checks over accepted for a long time? A. Yes.

Q. They used to stamp on the check "Accepted" with the date payable through the Clearing House, with the signature of the cashier? A. Signature of the teller.

Q. That went on for some time until you were advised that that was illegal? A. Yes.

Q. And then this method of making these day clearance loans was devised to take the place of the over acceptance of checks? A. Yes, that is right.

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Q. It was simply the continuation of the practice in another form? A. That is right.

Q. There was no separate account kept in your books, was there, with each of your customers who did this business, by which they were credited separately in a separate account with day clearance loans? A. Do you mean two accounts for every customer.

Q. Yes. A. No.

Q. All his deposits, whatever they were from whatever source, were credited to the same account? A. 795  
Yes.

Q. You expect, as I understand you, that the deposits made by a broker who gets a day loan, will come in during the day, at the beginning, at the opening of the bank at 10 o'clock for banking business? A. The deposits?

Q. Yes. A. I don't expect them as early as that.

Q. 11 o'clock? A. Well, I wouldn't worry about it if they were not received until later.

Q. I thought you said on direct examination if the deposits didn't come in you used to call up the customer? A. Yes, that is true, but that doesn't mean necessarily early in the morning; in the first place we don't certify until 10 o'clock; a man receives securities and delivers them elsewhere and checks up the loan, and waits until 11 o'clock and he borrows money, and you scarcely expect any deposits before 12 o'clock.

Q. If they didn't come in before 12 o'clock you would begin to call up? A. I don't think so; there isn't any fixed rule in regard to that.

**797** Q. Isn't it a fact if they don't make deposits right along after half past eleven or twelve you call them up and insist on their doing so? A. If we think a firm unduly delays sending up their deposits we call them up and ask them to hurry them along; we don't want all of our business to come in at the close of business and keep our men there all night to work it up.

Q. What do you call undue delay? A. I am as much at sea about that as the Supreme Court is as to unreasonable restraint; I can't fix the hour; it depends upon circumstances.

**798** Q. It doesn't make any difference to you or your bank where a man gets the money from to pay a demand loan, as long as he pays it? A. I am not so sure; it depends very largely on whether he continues to hold the securities that he took up with our money in trust for us until he could pay off the loan.

Q. Suppose your customer deposits checks, you don't care whose checks they are as long as they are certified checks and are good? A. I don't care whose **799** checks they are?

Q. No, if they are certified? A. I care if a broker fails to hold in trust the securities or the avails of them for the payment of that loan.

MR. ELKUS: I move to strike out the answer as not responsive.

Motion denied.

Exception.

**800** Q. If no deposits come in before 12 o'clock from a customer to whom you have made a demand clearance loan, would you call that undue delay in making deposits? A. No, I wouldn't.

#### RE-DIRECT EXAMINATION BY MR. GARVER:

Q. As to what would be undue delay would you take into consideration the firm to which you had made a loan and your previous dealings, and everything of that sort? A. Yes, there are any number of

matters to be taken into consideration ; for instance 801 on an active day where a great many transactions take place you naturally expect deposits would come in much later than if a firm would want to certify their check for a million dollars to take up a million dollars of New York City bonds which they had purchased for which they had already arranged the loan ; you would expect deposits to come in pretty soon ; there are many things that enter into it ; the matter of following those things up is left in the hands of the certification clerk and he is expected to take all these 802 things into consideration and act accordingly ; I wouldn't undertake to fix the hour ; some deposits don't get in until four o'clock in the afternoon.

Q. On a very active day ? A. Yes.

Q. Does the certification clerk have general oversight of the checks which are certified against these particular loans ? A. He certifies them himself ; he does the certification.

Q. How are those checks usually drawn ; are they drawn to the order of brokers or bankers as a general 803 thing ? A. To the order of the payees, yes, sir ; to the order of the banks or brokerage houses or trust companies.

Q. That is some indication of the use to which the checks are to be applied ? A. Yes, sir.

Q. Would it cause any remark by an officer of the bank to have a check for a large amount presented by a broker who had obtained such a loan, that was drawn to some one out of town ?

804

MR. ELKUS : Objected to as immaterial, irrelevant and incompetent.

Objection sustained.

Q. You spoke of one instance in your experience where a clearance loan had not been paid off before the close of business hours ; I understood you to say that was the only instance you recall ? A. Of course I didn't have in mind that you might possibly want to know whether we have found it necessary to charge

805 a demand note up against the account through oversight of the maker not sending up a check; such occurrences as that happen occasionally; it is the routine—

Q. But with that exception all of these loans made to all of these brokers for varying amounts every day of the year have been, so far as your experience goes, paid off before the close of business? A. With that one exception.

Q. Has your bank had different forms of obligation 806 at different times? A. Yes, we have.

Q. The method of doing this business by your bank prior to the adoption of any written instrument was similar, was it, to that which now prevails? A. Yes.

Q. That is, where there were over certifications they would be made good before the close of business? A. Yes.

Q. And that was also the case as to over acceptances? A. Yes.

Q. Does your bank make loans to Stock Exchange 807 houses without security? A. We either have security in our possession or understand that security is held in trust for us under the terms of the clearance loan.

MR. ELKUS: I move to strike out as not in answer to the question, and as immaterial, irrelevant and incompetent.

Motion denied.

Exception.

#### 808 RE-CROSS-EXAMINATION BY MR. ELKUS:

Q. Doesn't your bank loan money to bankers on their notes without any collateral whatever? A. No, sir, it does not.

Q. Doesn't it loan it to merchants? A. That is another proposition entirely; not to brokers at all.

Q. I am asking about bankers; do you mean to say you have never made a loan to a banker on his promissory note without collateral? A. By a banker do you mean a broker?

Q. I mean a banker, a banking house, a co-partnership doing a banking business? A. Always against collateral. 809

BY THE REFEREE:

Q. You loan on commercial paper? A. We loan on commercial paper without collateral.

BY MR. ELKUS:

Q. When you say in some cases where a broker didn't pay these demand clearance loans you charged it up to the account, what did you mean by that? A. I said there were various occasions that a broker through an oversight would fail to send up a check at the close of the day's business to take up his note, his account is good for it, and under a clause in the note it is made payable at the bank and is charged to the account, the same as you would charge a check; we prefer not to do it; we would rather have a regular check as a voucher and have the notes taken out of the bank every day. 810

Q. That is deducted from his credit account? A. Yes.

Q. If that broker does not at any time send a check you send his vouchers back to him and send back the day loan? A. We always have him send a check the next day; we prefer not to carry them as vouchers; we prefer his check; we prefer it as a cancelled voucher against his check with a memorandum on the check.

Q. Can you conceive of any circumstances where a broker did not make a deposit before 12 o'clock, who had one of these clearance loans, where you would consider that as undue delay in making deposits? 812

Objected to, as the witness has already been asked that question.

THE REFEREE: He may answer.

A. Based on experience—you asked if I can conceive of any circumstances?

813 Q. Yes ; based on your experience ? A. If a broker asks for a certification at 10 o'clock in the morning for the purpose of taking up certain securities which he means to immediately deliver and says a check would be deposited with us by 11 o'clock and it didn't come in until 12, I should say it was undue delay.

Q. That is the only fact, or only circumstance which you can conceive of, where it would be undue delay ? A. That is almost an inconceivable transaction.

814 Q. And that one inconceivable—almost inconceivable transaction, that would amount to undue delay ? A. If I watched for it and it didn't come in I would say he was not keeping faith.

Adjourned to Friday at 2 P. M., June 2, 1911.

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815

NEW YORK, June 2nd, 1911.

Met pursuant to adjournment.

Present : THE REFEREE ; MR. ELKUS ; MR. GARVER.

MR. ELKUS : I offer in evidence form of promissory note used by the National Bank of Commerce in the transactions testified to by Mr. Alexander. It is conceded this is the note he referred to in his testimony.

It is marked Plaintiff's Exhibit 16 of this date, and  
816 is as follows :

**Plaintiff's Exhibit 16.**

" N Form 334

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NEW YORK

191

On demand for value received promise to  
pay to National Bank of Commerce in New York or  
order at the office of said Bank in the City of New  
York the sum of Dollars.

It is expressly agreed that the stocks, bonds or 817 other securities, or the proceeds thereof, purchased by the undersigned with, or which may come into possession or control of the undersigned, out of the moneys loaned by said Bank, and evidenced by this note shall be by the undersigned, or its agent, or representative, held in trust for and deposited with said Bank, it being the intention and agreement of the undersigned to pledge and deposit with said Bank and to subject to the lien and control of said Bank as such pledgee the securities or moneys so acquired, as collateral to this obligation and to any other obligation or indebtedness of the undersigned to said Bank; and it is further agreed that said Bank shall have a lien upon all property of the undersigned and all collaterals pledged by the undersigned, now or hereafter in possession of said Bank, or under its control, as security for any indebtedness of the undersigned, now existing or to become due or that may be hereafter contracted, with the right at any time to demand additional security and with the right, in case of failure to comply 818 with such demand for additional security or in case of default in payment, to sell without advertisement or notice to the undersigned, at any broker's board in the City of New York, or at public or private sale in the said City or elsewhere, or to otherwise dispose of the same in the discretion of any of the officers of the said Bank without notice of amount due or claimed to be due, without advertisement, and without notice of the time or place of sale, each and every of which, is hereby expressly waived, applying the proceeds thereof 819 upon the said indebtedness, together with interest and expenses, legal or otherwise, the undersigned to be liable for any deficiency.

It is further agreed, that, upon any sale by virtue hereof the holder hereof, may purchase the whole or any part of such property discharged from any right of redemption, which is hereby expressly released to the holder hereof, who shall have a claim against the maker hereof for any deficiency arising upon such sale.

**821** It is further agreed that any moneys or property at any time in the possession of said Bank belonging to any of the parties liable hereon to said Bank, and any deposits, balance of deposits, or other sums at any time credited by or due from said Bank to any of said parties may at all times at the option of said Bank be held and treated as collateral security for the payment of this note or the indebtedness evidenced hereby whether due or not due, and said Bank may at any time at its option without demand for payment and  
**822** without notice charge this note to the account of the undersigned with said Bank or set off the amount due or to become due hereon against any claim of any of said parties against said Bank.

"

-----  
Adjourned to Friday, June 9th, 1911, at 2 P. M.

**823**

NEW YORK, June 16th, 1911.

Met pursuant to adjournment.

Present : THE REFEREE, MR. ELKUS, MR. GARVER.

**824**

It is stipulated that there are a number of banks in the City of New York in the vicinity of Wall Street, in addition to the defendant bank and the banks referred to in the testimony of Mr. Carse and Mr. Alexander, which now and for a number of years past have made day or clearance loans to stock exchange houses in substantially the same manner as that referred to in the testimony of Messrs. Carse and Alexander, and that if the officers of those banks were called as witnesses they would give testimony that their banks did similar business in substantially the same manner and under the same conditions as testified to by the witnesses Carse

and Alexander, except that The First National **825**  
Bank of the City of New York, a bank located  
at the corner of Wall Street and Broadway,  
with a capital stock of \$ , and de-  
posits of about \$ , and which does  
some business with stock exchange brokers in  
day or clearance loan transactions, has con-  
ducted such business since January 1, 1910, by  
taking from the brokers a memorandum at the  
time of making the day or clearance loans,  
which memorandum specifies in detail the secur- **826**  
ties that are expected to be cleared by such  
loans but the possession of which is not given  
to said Bank, and which memorandum and the  
agreement referred to therein are as follows:

(Form of Memorandum.)

"-----, 19... .

FIRST NATIONAL BANK,  
New York,

**827**

DEAR SIRS:

Please place to credit  
today avails of loan to us of \$ with  
following securities as collateral.

(Here is inserted a detailed statement of se-  
curities.)

----- hereby acknowledge re-  
ceipt, in trust of these securities and agree to  
either pay above named loan or deliver said **828**  
securities to you before three o'clock today.

Yours truly."

(Form of Agreement.)

" Know all men by these presents, That the  
undersigned, in consideration of financial accom-  
modations given, or to be given, or continued to  
the undersigned by The First National Bank of  
the City of New York, hereby agree with the said

**829** Bank that whenever the undersigned shall become or remain, directly or contingently, indebted to the said Bank for money lent, or for money paid for the use or account of the undersigned, or for any overdraft, or upon any endorsement, draft, guarantee or in any other manner whatsoever, or upon any other claim, the said Bank shall then and thereafter have the following rights, in addition to those created by the circumstances from which such indebtedness may arise against the undersigned, or his, or their executors, administrators or assigns, namely :

1. All securities deposited by the undersigned with said Bank as collateral to any such loan or indebtedness of the undersigned to said Bank shall also be held by said Bank as security for any other liability of the undersigned to said Bank whether then existing or thereafter contracted ; and said Bank shall also have a lien upon any balance of the deposit account of the undersigned with said Bank existing from time to time, and upon all property of the undersigned of every description left with said Bank for safe keeping or otherwise, or coming to the hands of said Bank in any way, as security for any liability of the undersigned to said Bank now existing or hereafter contracted.

2. Said Bank shall at all times have the right to require from the undersigned that there shall be lodged with said Bank as security for all existing liabilities of the undersigned to said Bank, approved collateral securities to an amount satisfactory to said Bank ; and upon the failure of the undersigned at all times to keep a margin of securities with said Bank for such liabilities of the undersigned, satisfactory to said Bank, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said Bank shall, at the option of said

Bank become immediately due and payable, 833 notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

3. Upon failure of the undersigned either to pay any indebtedness to said Bank, when becoming or made due, or to keep up the margin of collateral securities above provided for, then and in either event said Bank may immediately without advertisement, and without notice to the undersigned, sell any of the securities held 834 by it as against any or all of the liabilities of the undersigned, at private sale or Brokers' Board or otherwise, and apply the proceeds of such sale as far as needed towards the payment of any or all of such liabilities, together with interest and expenses of sale, holding the undersigned responsible for any deficiency remaining unpaid after such application. If any such sale be at Brokers' Board or at public auction, said Bank may itself be a purchaser at such sale free 835 from any right or equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid, said Bank may also apply toward the payment of the said liabilities all balances of any deposit account of the undersigned with said Bank then existing.

It is further agreed that these presents constitute a continuing agreement, applying to any and all future as well as to existing transactions 836 between the undersigned and said Bank.

-----"

and that the Bank of Manhattan Company, a state bank with a capital stock of about \$

and deposits of about \$

certifies checks against which no deposits have been made, such checks being paid off during and before the close of each banking day, and no promissory note or request to loan

837 or agreement is exacted from the broker by said bank.

The stipulation as to the testimony of bank officials heretofore set forth is to be taken subject to all objections and motions to strike out made by the plaintiff in connection with the testimony of the witnesses Carse and Alexander. The testimony which it is stipulated the bank officials would give if called as witnesses is objected to by the plaintiff on the ground that it is immaterial, irrelevant and incompetent, not binding on the plaintiff, the trustee in bankruptcy of Lathrop, Haskins & Company, consisting of legal conclusions, no proper foundation laid for it, not the proper method of proving usage and custom and no evidence of usage and custom and on the further ground that any evidence as to usage and custom is immaterial, irrelevant and incompetent, not binding on the plaintiff in this action, the trustee in bankruptcy of Lathrop, Haskins & Company, and directly tending to change, vary and contradict the terms of a written instrument and that such testimony is not within the issues raised by the pleadings in this action, and the plaintiff moves to strike out such testimony upon the grounds set forth in the objection thereto.

840 It is further stipulated that if the members of the stock exchange houses to which the said banks made the said so-called day or clearance loans were called as witnesses herein, each of the said brokers called would testify respectively that the amount of the so-called day or clearance loan was credited to his general account with the bank; that in this general account there was also credited the balance he had on deposit with the bank at the opening of the day;

That all of the moneys received by him in

the course of his business throughout the day, 841 from whatever source, was deposited with the bank making the so-called day or clearance loan, and credited to his general account as aforesaid ;

That in the course of the day he drew and had certified checks against the said account which were used to pay off demand or time loans and obtain the release of securities held as collateral thereto, or to take up stocks, bonds or other securities which he had agreed to purchase, or to borrow stock for delivery, or for the substitution of securities, but it was expected and understood that no portion of the proceeds of the day or clearance loan was used for any purpose other than to clear securities, although the broker is at liberty to draw against the balance standing to the credit of his account in excess of that derived from said day or clearance loan to pay the general expenses of his business and to meet the general obligations 842 thereof ; 843

That the securities he received as aforesaid were not kept separate but were mingled with all the other securities coming into his possession in the course of his daily business, and that the said securities were freely and at all times used by him to make deliveries on sales made in the course of his business, or were used as collateral in new demand or time loans or were substituted for other collateral then in demand or time loans ; 844

That he kept no separate account of the moneys received on the deliveries of stock acquired by him, as before mentioned, but that all the moneys received by him, in the course of the day, from whatever source, were deposited by him to the credit of his said account with the bank making the said loan ;

That the said day or clearance loans were paid off by his check or checks drawn to the

845      order of the bank, at the close of the day ; that during the day, as soon as checks were received by him from the sale of securities cleared by the proceeds of the day or clearance loan, or as soon as moneys were received by the broker from new loans made with the securities cleared by the day or clearance loan, the checks or moneys resulting therefrom were promptly deposited with the bank during the day as soon as or within a reasonable time after the same were received ; and that in order to pay off such day or clearance loans, if he had not sufficient funds on deposit with said bank which made such day or clearance loans, it would be necessary for him to obtain a demand or time loan at the Stock Exchange or from some bank or banker for that purpose. It sometimes happened that some loans were effected through brokers on the Stock Exchange for and on behalf of the identical bank making the day or clearance loan as aforesaid.

846      The collateral security used for such demand or time loan might be any or all securities in his (the broker's) possession from whatever source and howsoever those securities were acquired by him ; or he, the broker, might, if occasion required, apply directly to the bank making the said day or clearance loan for a new demand loan on such securities in his possession as aforesaid, as would be acceptable to the bank, in order to discharge his indebtedness under the day or clearance loan at the close of the day. The amount of such loan would be credited to his general account with the bank and the so-called day or clearance loan would be paid at the close of the day by check drawn against this account.

The testimony which it is stipulated that stock exchange brokers would give if called as witnesses in this proceeding is objected to by

the plaintiff on the ground that it is immaterial, 849 irrelevant and incompetent, not binding on the plaintiff in this action, speculative and conjectural, no proper foundation laid for it, and that it states legal conclusions and is not the proper method of proving any usage or custom and is no evidence of usage and custom, and on the ground that any evidence as to usage and custom in this action is immaterial, irrelevant and incompetent, not binding on the plaintiff and tends directly to change, vary and contradict 850 the terms of a written instrument, and that such testimony is not within the issues raised by the pleadings in this action, and the testimony which it is stipulated that the brokers would give as to what was expected or understood in the case of so-called day or clearance loans is objected to on the ground that it is immaterial, irrelevant and incompetent, conjectural and involving legal conclusions, not the proper method of proving any usage or custom, 851 no evidence of any usage or custom and tending directly to contradict, vary and change the terms of a written instrument and the plaintiff moves to strike out such testimony upon the grounds set forth in the objection thereto.

It is stipulated that if Mr. Henry S. Haskins were called as a witness he would testify as follows :

I returned to my office on the night of January 18th, 1910, and informed Mr. Dunn, our cashier, of a special loan of \$300,000 on 3500 shares of the Columbus & Hocking Coal & Iron Company common stock, which I had arranged to obtain the next morning. Mr. Dunn assured me that 2900 shares of the Columbus & Hocking Coal & Iron Company stock would be released by the payment of \$650,000 of loans, which payment would be brought about by liquidation of customers' accounts and that in addition to the 852

853      2900 shares, 600 shares of the 1310 in the box would go into said loan, making 3500 shares in all; that by converting the 3500 shares into cash, we would be able to pay off \$850,000 on January 19. This would leave us with \$370,000 in first-class securities not counting 90 Columbus & Hocking Coal & Iron 6% bonds on which we had never experienced difficulty in borrowing. Allowing for the customary 20% margin on the 90 bonds, other of which bonds were carried in bank loans at 100 and 101, we would have here an additional borrowing power of \$72,000, which would bring our excesses up to \$442,600 or about 14% on our loan obligations in addition to the customary 20% margin or more on all outstanding accounts. We also had a number of customers carrying other stocks upon whom we could have properly called for margins. Our cashier informed me that by paying off \$850,000 our loans would stand at \$3,169,000 and the amount of Columbus & Hocking Coal & Iron stock in the loans at 9800 shares, or an average of 325 shares to each \$100,000 borrowed. We had only three loans in our list with more than 500 shares of Columbus & Hocking Coal & Iron common stock to the \$100,000. One was a special loan carrying 1100 shares, another was a special loan carrying 1000 shares and the third was a regular call loan containing 600 shares; the balance of the loans ran from 100 shares to 500 shares and loans to the aggregate of over \$1,000,000 carried no Columbus & Hocking Coal & Iron stock as collateral.

This was the condition of our business predicated on obtaining the special loan on 3500 shares of Columbus & Hocking Coal & Iron common stock as previously mentioned, to be made on January 19th, and I had no doubts in my mind when I gave out the orders for Hocking stock on the morning of January 19th that

this program would be carried out to the 857 letter. This loan on the 3500 shares of Hocking stock was, however, never effected. I have believed and do believe in the Columbus & Hocking Coal & Iron Company and have been outspoken in this belief; but, if you look back at the testimony taken by the Special Committee of the New York Stock Exchange and by the Committee on Insolvencies of the New York Stock Exchange, you will find that I made no special inducement to anybody to sign a pool 858 agreement in our behalf, neither have I ever asked anybody to buy the stock. Much of the enthusiasm has been due to my belief in the property but much of the buying which put the stock up to 92½ was by people outside of my own zone of influence. There never was the slightest attempt on my part or on the part of my friends to distribute the stock. To get a proper idea of what I attempted to do, one must regard the Columbus & Hocking Coal & Iron 859 Co. as a new venture beginning less than a year from January, 1910, when oil was first discovered near the property and when I first took hold of the brick plant, my objective then being a production of 200,000 bricks per day. After drilling six unsuccessful wells we struck a large gas well reported to me at the time to have a capacity of between three and four million cubic feet per day commercially worth five cents per 1,000 cubic feet or \$200 per day. This well, 860 however, has never been commercially utilized and its producing power or commercial value has never actually been tested.

Within three months prior to January, 1910, we developed what appeared to be a large prospective oil value when we struck two wells in the heart of our large holdings at New Straitsville, Ohio, the standard pipe having just been connected with the wells prior to the pool's collapse. This field in January, 1910, promised

861 to be one of the most important oil fields ever discovered in Ohio. The oil is the highest priced and best quality in existence. When the crash in the stock came, the brick plant was within three weeks of completion at an additional expense, as I believed in January, 1910, of only about \$11,000. Since that time the re-organization committee has already spent \$60,000 in an effort to complete the plant. The brick lands and completed plant represent a cost of approximately \$1,000,000. The net income of the Coal & Iron Company in January, 1910, that is during the coal months, was about \$600 per day from coal and about \$200 per day from oil. The Company controls some 12,000 acres of the best clay lands in Ohio and it is estimated can make a profit of four to five dollars per thousand on its brick with a quick market in normal times for all of its output.

862  
863 I never contended that the price of the stock measured the past value of the property or its value in January, 1910, but I was sincere in the belief, and so were a large majority of the stockholders, that the prospective value justified the quotations up to January 19th.

864 It is further stipulated and agreed that if the Referee should find that at the time the defendant received the securities in controversy herein, the firm of Lathrop, Haskins & Company was insolvent, within the meaning of the National Bankruptcy Act, he should also find that, at the same time Henry S. Haskins, a member of the said firm, was also insolvent, within the meaning of the said Act.

And it is further stipulated that at the time the defendant received the securities in controversy herein Henry S. Haskins, a member of the firm of Lathrop, Haskins & Company, had no individual assets except his seat in the New York Stock Exchange.

The testimony which it is stipulated that 865 Henry S. Haskins would give if called as a witness in this proceeding is objected to by the plaintiff on the ground that it is immaterial, irrelevant and incompetent, not binding on the plaintiff, the trustee in bankruptcy in this action, speculative and conjectural and does not in any way tend to show the financial condition of the firm of Lathrop, Haskins & Company or of its individual members at or about the time of the delivery to the defendant of the securities in 866 controversy herein, and the plaintiff moves to strike out such testimony upon the grounds set forth in the objection thereto.

The Referee overrules each and every objection interposed and denies each motion and the plaintiff duly and separately excepts to each such ruling.

It is stipulated that the Hanover National Bank did not use any other instrument for day or clearance loans than as testified to by Mr. 867 Carse, being plaintiff's Exhibits 14 and 15.

MR. ELKUS: I renew my motion to strike out the testimony of Mr. Albeck in which he said he had a conversation with Mr. Hotchkiss prior to his appointment as Receiver in which he claimed Mr. Hotchkiss said they were entitled to the securities, as immaterial, irrelevant and incompetent, not binding upon the plaintiff in this action.

Motion denied.

868

Exception.

MR. ELKUS: On page 88 of the record we were to furnish a statement of the claims filed in the bankruptcy proceedings of Lathrop, Haskins & Company. It includes the claims filed to date and we have submitted it to Mr. Garver and he has consented that it may be filed.

It is as follows:

**869 CLAIMS FILED IN BANKRUPTCY PROCEEDINGS OF  
LATHROP, HASKINS & COMPANY.**

1	F. W. Duryea & Co.	9.50
2	Herrick, Berg & Co.	6.25
3	S. L. Wilson	.15
4	Chas. F. Green	43,858.55
5	Schuyler, Chadwick & Burnham	28,324.49
6	A. J. Elias & Co.	123,017.42
7	Rollins & Co.	69,704.16
870 8	Carrie Strauss	717.00
9	Katherine S. Morrison	182.29
10	Catherine S. Leverich	2,531.25
11	Robert F. Little	274,951.92
12	Green Bros.	4,645.75
13	Janet F. Little	125.19
14	C. W. Johnson	1,398.18
15	Randolph A. Simon	388.23
16	E. H. Osborn	105.20
17	Henry S. Strauss	125.00
871 18	Kanouse Mountain Water Co.	2.50
19	Hamilton Press	9.00
20	C. T. Willard	19,864.23
21	Cecelia Flanagan	1,887.45
22	Lincoln Trust Co.	2,315.75
23	Anna C. Phyfe	476.22
24	Francis Cluzelle	3,433.27
25	J. H. Waggoner	235.00
26	Chauncey & Co.	2.00
27	H. H. Cone	7.89
872 28	C. H. Boilhart	76.50
29	William B. Dana	3.00
30	Edward Martin	1,581.32
31	John A. Dix	14.00
32	Cummings & Mankvald	12.60
33	William R. Colton & Bro.	31.25
34	William V. Bayles, Jr.	128.00
35	F. S. Bosworth	473.27
36	Robert L. Reid	214.44
37	F. C. Haesen	497.36

38	Rae H. Rogers.....	14.00	873
39	R. A. De Russey.....	16.00	
40	Harriet C. Green.....	739.24	
41	Wilcox & Co.....	47.50	
42	Chas. B. Dunlap.....	505.34	
43	Chas. W. Turner.....	10.00	
44	H. I. Judson & Co.....	2.00	
45	John H. Auerbach.....	166.00	
46	Annie F. Leverich.....	18,358.47	
47	" " "	63,518.20	
48	E. A. Isaacs.....	40.00	874
49	Richard M. Bell.....	3,817.41	
50	Hortense Walker.....	999.60	
51	Alice Kraft.....	1,206.30	
52	Louis Breslauer.....	2,462.41	
53	First National Bank.....	22,168.65	
55	Percival G. Barnard.....	14.89	
56	Western Union Telegraph.....	14.80	
57	Dow, Jones & Co.....	80.00	
58	George F. Secor & Co.....	5,200.00	
59	Martin & Floyd.....	142.63	875
60	Nelke Phillips Co.....	6,835.28	
61	Gustave S. Boehm.....	7,281.61	
62	Sarah Martin.....	11,564.05	
63	J. P. Morgan & Co.....	99.27	
64	N. Y. Produce Ex. Bank.....	150.00	
65	N. Y. Telephone Co.....	107.03	
66	Wm. R. Colton & Bros.....	31.25	
67	John Feldman.....	15,472.13	
68	Ottlie Hessner.....	10,864.46	
71	Y. Pendas.....	8,287.99	876
72	Commercial Chronicle.....	45.00	
73	Homans & Co.....	10.00	
74	Anglo Telegraph Co.....	3.25	
75	Robert J. Farmer.....	501.88	
76	Charlotte M. Baird.....	1,015.62	
77	Feichin and J. Kretzer.....	393.43	
78	Nina J. White.....	1,953.99	
79	S. J. McCullough & Co.....	4.15	
80	Martin & Floyd.....	142.63	

877	81	F. M. Sharpe	9,815.17
	82	S. Carissima Burt	94.56
	83	Emma G. Osborne	24,253.07
	84	Henry O. Seixas	10,573.03
	85	American Ice Co.	1.58
	86	Harriet H. Clark	56.56
	87	C. H. Messmore	19.33*
	88	Peerless Towel Supply Co.	2.25
	89	Ella M. Greaves	7,176.58
	90	David L. Evans	4,966.90
878	91	Mount Morris Bank	4,106.15
	92	Trustees J. M. Fiske Co.	123,578.79
	93	Estate R. R. Graves	665.37
	94	Postal Telegraph Cable Co.	24.23
	95	Maude A. Haskins	2,031.53
	96	Marian L. Haskins	2,902.49
	97	Fannie S. Lathrop, Executrix	41,670.64
	98	Morrison Rogers	63.50
	99	Fannie S. Lathrop	2,387.37
	100	Carroll Berry	1,211.35
879	101	Walter R. Grant, Pfd.	100.00
	102	Estate R. R. Graves	18,446.97
	103	Florence G. Lathrop	16,573.69
	104	Oliver Gildersleeve	1,000.00
	105	Hugh R. Syle	18,232.57
	106	L. Schepp & Co.	13,215.00
	107	John W. Carroll	2,100.00
	108	National Park Bank	23,648.50
	109	David E. Morrison	555.64
	110	Estate Robert J. Gray	2,934.78
880	111	City of New York	419.51
	112	Harry P. Clark	183.34
	113	John A. Fonda	5,601.49
	114	Sadie Newman	350.00
	115	Eliza Wolff	300.00
	116	Meyer I. Newman	7,000.00
	117	Genevieve Vedder	5,609.82
	118	Robert S. Larsiter	1,790.62
	119	C. P. Vedder	16,587.83
	120	American District Telephone Co.	10.50

120	Day, Adams & Co.	186,162.51	<b>881</b>
121	Henry Greenspan	660.53	
122	Albert Vanderveer, Jr.	650.67	
123	Frederick J. H. Sutton	6,322.83	
124	T. S. Darling	6,924.09	
125	Farmers' Loan & Trust Co.	215,994.85	
126	Sarah Martin	11,571.00	
127	Emily H. Florence	615.29	
128	H. W. Doremus	148.35	
129	Estate Ellery Denison	24,389.81	
130	Mrs. W. F. Kelly	7,921.28	<b>882</b>
131	Henry J. S. Hall and John C. Travis	79,432.19	
132	Robert Flanagan	4,259.12	
133	Max S. Boehm	20.58	
134	H. G. Greene	704.77	
135	M. L. C. Kachelmacher	17,090.47	
136	Frank M. Sharpe	7,173.33	
137	H. Hentz & Co.	23,545.85	
138	Hortense Walker	738.91	
139	Alice Kraft	372.11	
140	Charles Strang	9,872.27	<b>883</b>
141	Walter F. Healy	3,595.48	
142	Eugene C. Pommeroy	58,985.50	
143	F. J. Kretzer	393.43	
144	Charlotte M. Baird	1,015.62	
145	Fred R. Smyth	5,849.04	
146	Harry Strang	4,878.63	
147	William Bayles	128.00	
149	Thomas L. Jacques	342.85	
150	Washington L. Jacques	510.30	
152-3-4	Roberts, Hall & Criss	517,258.51	<b>884</b>
155	Jane L. Hill	3,319.45	
156	Eleanor C. Darvy	1,368.16	
157	Eleanor D. Melendy	807.06	
159	Importers & Traders National Bank	30,467.70	
	Total	\$2,369,384.29	

885

## SECURED CLAIMS.

<b>54</b>	H. Gilston & Com. -----	\$240.00
<b>70</b>	Market & Fulton Bank-----	100,000.00
<b>158</b>	Guaranty Trust Co.-----	200,244.44
<b>148</b>	Metropolitan Trust Co.-----	115,314.10
<b>151</b>	Central Trust Co.-----	322,503.58
	Total-----	\$738,302.12

886

MR. ELKUS : We rest.

MR. GARVER : We rest.

Adjourned to July 14th, 1911, at 11 A. M. for oral argument and submission of briefs and one week after for reply briefs.

887

888

**Stipulation and Schedule Substituted for  
Schedule A1.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as  
Trustee, etc.,  
Complainant,  
  
AGAINST  
  
NATIONAL CITY BANK,  
Defendant.

890

891

It is hereby stipulated and agreed by and between the solicitors for the complainant and the solicitors for the defendant in the above entitled cause that the defendant, up to the 24th day of October, 1911, received the following interest and dividends at the times indicated on the securities in suit :

Securities	Paid	Rate	Amt.	Total
200 Sou. Pac.	Apr. 1-10	1½%	\$300	
	Jly. 1-10	"	300	
	Oct. 1-10	"	300	
	Jan. 1-11	"	300	892
	Apr. 1-11	"	300	
	Jly. 1-11	"	300	
	Oct. 1-11	"	300	
			—	\$2,100

200 Reading com. (books closed Jan. 15 1910)	Aug. 1-10	3%	300	
	Feb. 1-11	"	300	
	Aug. 1-11	"	300	
			—	900

<b>893</b>	<b>100 N. Y. Cent. &amp; Hud.</b>	Apr. 15-10	$1\frac{1}{2}\%$	150	
		Jly. 15-10	"	150	
		Oct. 15-10	"	150	
		Jny. 15-11	"	150	
		Apr. 15-11	$1\frac{1}{4}\%$	125	
		Jly. 15-11	"	125	
		Oct. 16-11	"	125	
					<u>—</u>
					<b>975</b>
	<b>300 Rock Is. com.</b>		<b>No dividend.</b>		
<b>894</b>	<b>100 Cons. Gas.</b>	Meh. 15-10	$1\frac{1}{2}\%$	100	
		Jne. 15-10	"	100	
		Sep. 15-10	"	100	
		Dec. 15-10	$1\frac{1}{2}\%$	150	
		Meh. 15-11	"	150	
		Jne. 15-11	"	150	
		Sep. 15-11	"	150	
					<u>—</u>
					<b>900</b>
	<b>100 Smltg. &amp; Ref. com.</b>	Apr. 15-10	$1\frac{1}{2}\%$	100	
<b>895</b>	<b>(books closed Dec. 26-1909)</b>	Jly. 15-10	"	100	
		Oct. 15-10	"	100	
		Jny. 15-11	"	100	
		Apr. 15-11	"	100	
		Jly. 15-11	"	100	
		Oct. 16-11	"	100	
					<u>—</u>
					<b>700</b>
	<b>200 Hock. Co. &amp; Iron com.</b>		<b>No dividend.</b>		
<b>896</b>	<b>300 Mo. Kan. &amp; Tex. com.</b>		<b>No dividend.</b>		
	<b>100 Wabash com.</b>		<b>No dividend.</b>		
	<b>250 Anaconda</b>	Apr. 19-10	$\frac{1}{2}\%$	125	
	<b>(books closed January 7-1910)</b>	Jly. 20-10	"	125	
		Oct. 19-10	"	125	
		Jny. 18-11	"	125	
		Apr. 18-11	"	125	
		Jly. 18-11	"	125	
		Oct. 18-11	"	125	
					<u>—</u>
					<b>875</b>

100 Texas Pac.		No dividend.		897
100 Kan. Cty. So. com.		No dividend.		
100 Natl. Lead com.				
	Apr. 1-10	1½%	125	
	Jly. 1-10	"	125	
	Oct. 1-10	¾%	75	
	Jan. 1-11	"	75	
	Apr. 1-11	"	75	
	Jly. 1-11	"	75	898
	Oct. 1-11	"	75	
			---	625
50 U. S. Steel com.				
	Mch. 30-10	1½%	87.50	
	Jne. 29-10	1½%	62.50	
	Sep. 29-10	"	62.50	
	Dec. 30-10	"	62.50	
	Mch. 30-11	"	62.50	
	Jne. 30-11	"	62.50	899
	Sep. 30-11	"	62.50	
			---	462.50
10 Union Pac. conv. 4s.	Jly. 1-10	2%	200	
	Jny. 1-11	"	200	
	Jly. 1-11	"	200	
			---	600
			---	88,137.50

That the defendant bank received also the sum of <sup>900</sup> \$3.12, the proceeds of sale of rights of Smelters stock.

That on October 4th, 1910, the defendant bank paid the sum of \$50 as the cost of withdrawing 200 shares of the common stock of the Columbus & Hocking Coal & Iron Company from the hands of the Refunding Committee. The defendant had deposited this stock with the Committee and then decided not to pay the assessment.

It is further stipulated and agreed that this stipulation be incorporated in and made part of the record

901 in this cause and be substituted in place of the present Schedule A1 annexed to the stenographer's minutes.

Dated New York, October 24th, 1911.

ABRAM I. ELKUS & WM. S. MCGUIRE,  
Solicitors for Complainant.

SHEARMAN & STERLING,  
Solicitors for Defendant.

902

**Report of Special Master.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

903 HENRY D. HOTCHKISS, as Trustee in  
Bankruptey of HENRY S. HASKINS,  
HENRY LEVERICH, Individually, and  
FANNIE G. LATHROP, Special Partner,  
and as Copartners trading  
under the firm name of Lathrop,  
Haskins & Company,

AGAINST

NATIONAL CITY BANK.

904

TO THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK:

It having been referred to me as Special Master by an order of this Court bearing date October 31st, 1910, to take the testimony in this action and report the same to the Court with my opinion, I respectfully report:

That the parties and their counsel appeared before me on October 31st, 1910, and on subsequent days. That before proceeding to the hearing in the case the parties by a stipulation made before me and entered

upon the stenographer's minutes waived the taking of 905 the usual oath of the referee. Thereafter I heard the testimony offered which has been transcribed and is submitted with this report ; and having heard the argument of counsel and all things having been duly considered, I report my opinion as follows :

The testimony, which in its material and essential matters is uncontradicted, in my opinion establishes the following facts:

I. The defendant was at all the times hereinafter mentioned and is a national bank incorporated under the laws of the United States of America, and having its principal place of business at No. 55 Wall Street, in the Borough of Manhattan, City and State of New York.

II. On January 19, 1910, and for some two years prior thereto, Henry S. Haskins, Henry Leverich, as general partners, and Fannie G. Lathrop, as special partner, were co-partners doing business as stock brokers in the City of New York under the firm name of Lathrop, Haskins & Company, the said Henry S. Haskins being a member of the New York Stock Exchange.

III. The firm of Lathrop, Haskins & Company during its existence had a single bank account which was with the defendant, and the said firm and its predecessors had for several years prior to January 19, 1910, dealt with the defendant as their banker.

IV. According to the general usage among stock brokers dealing through the New York Stock Exchange stocks and bonds sold are deliverable on the next business day after the sale, payment being made upon delivery. It frequently happens that the stocks and bonds sold by a broker have been pledged by him as security for loans, and to obtain them for delivery the broker is obliged to pay such loans or so much thereof as is necessary to release such stocks and bonds.

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909 V. In order to obtain funds to make such deliveries and to pay for stocks and bonds purchased pending the delivery of the same to their customers or the arranging of loans thereon a general custom exists among such brokers to obtain from their banks each business day a loan or extension of credit called a day or clearance loan.

Such loan is made by the bank's crediting the account of the broker with the amount of the loan and certifying the checks of the broker against his account. Such clearance loans are usually but not always evidenced by demand notes, but it is the established custom that the loan is in any event payable before the close of the day without a special demand.

910 VI. Prior to January 19, 1910, the firm of Lathrop, Haskins & Company and its predecessors had for many years been accustomed to obtain from the defendant each business day a clearance loan such as is described in the preceding finding, which had in every 911 case been repaid on the same day.

VII. On January 19, 1910, at about 10 A. M. the defendant loaned to the said firm of Lathrop, Haskins & Company the sum of \$500,000 and at the same time received from said firm two promissory notes, one for \$300,000 and one for \$200,000. The following is a copy of the note for \$300,000, the other note differing from it only in the amount:

912

" \$300,000.

NEW YORK, January 19, 1910.

On demand for value received we promise to pay to The National City Bank of New York, or order, Three hundred thousand (300,000) Dollars, hereby agreeing that said bank shall have a lien upon all property of the undersigned now or hereafter in its possession or under its control, as security for any indebtedness of the undersigned now existing or hereafter contracted, with the right at any time to

demand additional security, and with the right, **913** upon default in payment, to sell, without advertisement or notice to the undersigned, any or all of the securities or property so held, at public expense or private sale, or to otherwise dispose of the same in the discretion of any of the officers of said Bank, applying the proceeds upon the said indebtedness together with interest and expenses, legal or otherwise, the undersigned to be liable for any deficiency.

LATHROP, HASKINS Co." **914**

The amount standing to the credit of the firm on deposit with the defendant at the opening of business on January 19, 1910, was \$54,319.98. Upon the making of the loan of \$500,000 that sum was credited to the firm in its deposit account and during the day the said firm made deposits amounting to \$374,845.80. Three checks previously deposited by said firm aggregating \$9,411.73 were not paid and thereafter were charged against said firm's account by the defendant. **915**

Soon after 10 A. M. of said day the defendant certified and subsequently paid six checks drawn by said firm aggregating \$535,920.74, leaving a credit balance on said deposit account of said firm of \$383,833.31 and at the time of the delivery to the defendant of the securities hereinafter mentioned there was unpaid upon the said day loan as aforesaid the sum of \$116,-166.69 over and above the balance standing to the credit of the said firm on its deposit account.

**916**

VIII. At the opening of business at 10 A. M. on said January 19, 1910, estimating the value of the assets of said firm by the quotations upon the New York Stock Exchange, the said firm was solvent, and the fair valuation of its assets based upon such quotations exceeded its liabilities by at least the sum of \$400,000.

Among the firm's assets were large amounts of the stocks and bonds of the Columbus & Hocking Coal & Iron Co. The common stock of said Company for

917 about three months prior to January 19, 1910, had sold upon the New York Stock Exchange at about \$80 per share, and the bonds of the said Company during the said period had sold at or slightly above par.

Shortly after the opening of the New York Stock Exchange on January 19, 1910, the common stock of the Columbus & Hocking Coal & Iron Co. declined rapidly from \$80 a share to about \$25 a share, and as a result of such decline the said firm was unable to meet its obligations. Shortly after 12 o'clock of said 918 day a letter written by Mr. Haskins for said firm notified the New York Stock Exchange that the said firm was unable to meet its obligations. This letter was read by the President of the Stock Exchange from the rostrum on the Exchange in the presence of about two hundred and fifty brokers at eleven minutes after twelve o'clock. At about the same time another letter was written by Mr. Haskins for said firm and delivered to the defendant which informed it that the firm would be forced to suspend and an assignee would be appointed.

Prior to the receipt of the last letter referred to Mr. Albeck, the Assistant Cashier of the defendant, had noticed the decline in the price of the common stock of the Columbus & Hocking Coal & Iron Co. and he knew that Lathrop, Haskins & Company were largely interested therein. Mr. Albeck informed Mr. Kilborn, the Vice-President of the bank, of the decline in the quotations of the stock and informed him of the loan of \$500,000 to Lathrop, Haskins & Company. Messrs. 920 Albeck and Kilborn then went to the office of Lathrop, Haskins & Company and demanded from the firm securities to make good the firm's obligations to the bank. While at the office of said firm Messrs. Albeck and Kilborn were informed that the firm had sustained serious losses, that their suspension had been announced at the New York Stock Exchange, that the firm was unable to meet its obligations and that a petition in bankruptcy had been filed or would be filed against the firm. They remained in the office of said firm about two hours, and finally between

2 and 3 P. M. the said firm delivered to them the 921 securities mentioned in Schedule A annexed to the Bill of Complaint, the fair valuation of which securities at the time of delivery was \$154,300, and at the date of the delivery of said securities Messrs. Albeck and Kilborn were informed by Mr. Robert F. Little who was at that time acting as the attorney and adviser of said firm, that the delivery of said securities was a preference of the defendant over other creditors.

At the same time said securities were delivered as aforesaid the said firm of Lathrop, Haskins & Company was insolvent. Its liabilities exceeded the fair value of its assets by upwards of \$600,000, and the individual members of said firm were also insolvent. 922

IX. At about 4:10 P. M. of said January 19, 1910, a petition in involuntary bankruptcy was duly filed against the said partners individually and as such co-partners in the office of the Clerk of the United States District Court for the Southern District of New York and such proceedings had thereon that thereafter 923 Henry S. Haskins, Henry Leverich, individually, and Fannie G. Lathrop, as special partner, and the firm of Lathrop, Haskins & Company were duly adjudged bankrupts. All proceedings in connection with such bankruptcy were duly referred to Hon. STANLEY W. DEXTER as referee and the complainant was duly appointed the trustee in bankruptcy of the said bankrupts and has duly qualified as such.

X. At the time said securities were delivered to 924 Messrs. Albeck and Kilborn, the agents of the defendant, they knew that the said firm was insolvent and that the individual members thereof were insolvent, and they had reasonable cause to believe that it was intended by said firm in the delivery of said securities to them to give the defendant a preference whereby it would be enabled to obtain a greater percentage of its debt than any other creditors of the same class.

Since receiving said securities the defendant has collected interest and dividends thereon, as set forth

925 in the schedule attached to the stenographer's minutes marked A (1) October 17th, 1911, and amounting in the aggregate to \$7,440.62.

The learned counsel for the defendant contends that the firm were not shown to have been insolvent when the securities were delivered and that it does not appear that the firm intended to give the defendant a preference.

926 The first contention rests upon the fact that the common stock of the Columbus & Hocking Coal & Iron Co. had sold for upwards of \$80 per share for several months prior to January 19th, and as no change was shown to have taken place in the financial condition of the Company on January 19th to which the decline in the price of the stock could be attributed, the quotation on January 19th on the New York Stock Exchange did not fairly reflect the real value of the stock.

927 The proof is that there was a pool operating in the common stock of this Company the purpose of which was to advance the price thereof, and that the sudden fall in the price on January 19th was attributed to the selling out of one of the chief operators of the pool. It is quite evident from subsequent events that the price of the stock was advanced and maintained by this pool far beyond its real value. Before February 1, 1910, the quotations on the New York Stock Exchange fell to \$14; in the month of March they fell to \$10; in the following summer to \$5; and the last sale was at \$2 per share.

928 In January, 1910, the property of the Company was placed in the possession of a receiver in insolvency proceedings and was still in the hands of the receiver at the time of the trial.

It is true that Mr. Haskins appears to have been of the opinion that the stock was very valuable, but this was an opinion only and was not based upon the actual value of the property owned by the Company, but upon its prospective value. He testified among other things as follows:

"I never contended that the price of the stock 929 measured the past value of the property or its value in January, 1910, but I was sincere in the belief and so were a large majority of the stockholders that the prospective value justified the quotations up to January 19th."

Mr. Haskins and his associates were evidently mistaken in their opinion, as the enterprise so far as the testimony shows was a complete failure.

With reference to the intent of the bankrupts to give 930 a preference the testimony admits of no other conclusion than that which I have stated. There is no reason to disbelieve the testimony of Mr. Robert F. Little that he told Messrs. Kilborn and Albeck when he gave them the securities that it was a "clear preference \* \* \* and that the City Bank was the safest place for the securities and whatever was right would be properly taken care of."

He further testified that he explained the situation fully to Messrs. Kilborn and Albeck giving them full 931 details about the pool with James R. Keene; and that the loss sustained would be about \$2,000,000; that he told them that the firm was insolvent and that a petition in bankruptcy was either filed or being filed against it.

While some of Mr. Little's testimony is contradicted by Messrs. Kilborn and Albeck much of it is admitted and there is no question but that those gentlemen when they received the securities knew the condition of the firm as fully as it was possible to know it at 932 that time, and with their experience in business affairs they must have known that there was very slight chance that the firm would resume business and be able to pay its creditors.

The fact that Messrs. Albeck and Kilborn may have believed that the bank was legally entitled to be preferred or that they were so advised by their counsel cannot affect the bank's right to retain the securities.

In my opinion the facts bring the case within § 60 of

933 the Bankrupt Law, and the transfer of the securities is voidable by the trustee.

The words "same class" in § 60 refer to classification created by the Bankrupt Act prescribing the order of priority in the distribution of the general estate, and creditors entitled to the same percentage on their debts are in the same class.

Swarts v. Fourth National Bank, 118 Fed. Rep., 16.

934 The defendant is therefore within the class of general creditors, and as the securities delivered to it would pay its claim in full, the effect of the transfer, if it should be sustained, would be to enable the defendant to obtain a greater percentage of its debt than other creditors of the same class.

Unless, therefore, some of the special defenses pleaded can be sustained, the plaintiff is entitled to recover the securities or their value.

As a separate and special defense the defendant 935 pleaded that the loan of \$500,000 made by the defendant to the firm of Lathrop, Haskins & Company on January 19, 1910, was made to enable the said firm "to meet its current obligations and to enable it to perform its existing contracts for the receipt of stocks for which it was to pay on that day which were pledged as security for loans previously obtained at other banks," and that "it was understood and agreed between the defendant and the said firm at the time of making the said loan" that the loan "should either 936 be paid off during the day out of the proceeds of securities which were deliverable by the borrowers on that same day, or in the event of payment not being made in full the remainder of such loan should be secured before the close of business on the same day by securities obtained by said firm with the proceeds of said loan" and "that the securities referred to in the bill of complaint were delivered to the defendant pursuant to said understanding and agreement."

It was further urged that the said understanding and agreement which was made between the defendant

and said firm "was in accordance with the general usage" of such business "between the defendant and the said firm and between banks in the City of New York and Stock Exchange brokers, a usage which was well known to all persons doing business with the said firm including then existing creditors."

The material question arising upon this allegation is whether there was existing any agreement between the defendant and said firm which was applicable to said loan whereby if said loan was not paid in full before the close of business on January 19th, the balance was to be secured "by securities obtained by said firm with the proceeds of such loan," and whether the securities delivered to the defendant were delivered in performance of such agreement.

As I have reached the conclusion that no such agreement existed or could be applicable to the loan in question, it is unnecessary to consider whether if such an agreement had been proven it would have prevailed over the provisions of § 60 of the Bankrupt Law, or to determine what would in such case have been the rights of the respective parties.

There is no claim by the defendant that such an agreement was entered into at the time the loan in question was made, nor is it claimed that such an agreement was in general terms ever actually made between the defendant and the said firm which was applicable to day loans generally of a similar character which were made by the defendant to the said firm.

The claim of the defendant is that such an agreement arose out of a general custom or usage existing as to all similar loans made by the defendant and other banks located in or in the vicinity of Wall Street in the City of New York to brokers dealing in stocks and bonds and other securities on the New York Stock Exchange, and that all such loans must be deemed to incorporate within the agreement for their payment or security an obligation on the part of the borrower to pay off said loan before the close of business on the day the loan is made or if the loan is not paid in full to secure the payment thereof by the pledge of some

941 or all of the securities obtained by the borrower with the proceeds of the loan.

It appears that securities bought and sold on the New York Stock Exchange are deliverable on the day following their sale. The daily aggregate of the transactions of Stock Exchange houses is large and generally beyond the available capital of the brokers, and such houses are enabled to carry out their contracts only by accommodation in the nature of day loans made by the banks in which their deposit accounts 942 are kept. Loans made by the banks for this purpose are known as day or clearance loans. They are made by the banks without interest and are generally but not in all cases evidenced by a demand note made by the borrower and delivered to the lender. It is the general understanding and agreement as to all such loans that they are payable before the close of business on the day they are made without demand.

The general custom of banks where a demand note is taken from the borrower (which is the usage of the 943 defendant) is that each morning the broker sends to his bank a demand note for the amount of money he desires to use in payment of securities deliverable on that day or in payment of loans payable on that day.

The bank accepts this note and credits to the broker on his deposit account upon the books of the bank, the amount of the loan and an entry of the same amount is made in the broker's deposit book. During the day the broker makes deposits which are credited in like manner to his account. The bank certifies 944 the broker's checks to the amount of the loan or to such larger amount as the credit to his deposit account will permit. At or before 3 P. M., which is the close of the business day, the broker sends to the bank his check for the amount of the loan and the demand note is stamped "Paid" and delivered to the broker.

Such was the usage or custom as to day loans which prevailed between the defendant and Lathrop, Haskins & Company.

Lathrop, Haskins & Company kept but one bank account and that was with the defendant, and the firm

and its predecessors had been customers of the bank 945 for several years. In each instance of a day loan a demand note was taken by the defendant similar in form to the notes given on January 19, 1910.

Mr. Albeck, the Assistant Cashier of the defendant, testified in relation to day loans generally made by the defendant that the bank expected deposits would be made by the borrower within a reasonable time after the demand note was accepted by the bank, and that the bank's idea was to have deposits made as quickly as possible. If deposits were not made within a reasonable time the broker would be called upon and the cause of the delay ascertained. 946

As to the general custom prevailing with banks making day loans the testimony is as follows :

Mr. Kilborn testified :

"It is the custom in Wall Street and has been for a good many years that banks furnish a credit so that brokers can clear their stocks. The bank in issuing that credit, it is not a pure 947 credit by any means, it is a credit which is extended so that they can pay up their loans so called and take up securities which they had purchased, with the understanding that this credit is to be made good either by check or the placing of a loan with you to make good that credit which you extended to them" (S. M., p. 129).

Mr. Carse, the Vice-President of the Hanover National Bank, testified as follows, as to the custom of the Hanover Bank in making day loans :

"The broker, in the morning, figuring up the amount of stocks or securities he has to pay for, or the loans that he has to turn over, makes up a demand note for a round amount, and sends it up to our loan desk with his pass book; we make a loan for the amount, enter it in the pass book, and credit it on the ledger; a

949 memorandum of this amount is made on the certification book, together with the amount of balance to the credit of the account at the opening of business, and from time to time during the day any deposits that are made for the credit of the account, and against such credits we certify checks that are presented during the course of the day by the broker. When the day's work is cleared up the broker sends up a check to the loan clerk for the same amount as the notes; we stamp the note "Paid," and return it to him, and the check going through the books as a charge, offsets the credit that was made on the loan in the morning.

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Q. Is that process repeated each day?

A. It is repeated each day."

S. M., p. 187.

Mr. Alexander, Vice-President of the National Bank of Commerce, also gave testimony as to the custom prevailing in his bank. As it appears that the National Bank of Commerce always requires from the borrower a note in which it is stipulated that the stocks, bonds and other securities, or the proceeds thereof, purchased by the borrower, with the money loaned by the bank, shall be by the borrower or his agent held in trust by the bank or deposited with it, and be subject to the lien and control of the bank as pledgee, it is unnecessary to refer to his testimony.

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Mr. Alexander's knowledge of the custom relating to day loans was confined to those made by the National Bank of Commerce, and he had no knowledge as to the custom of other banks. The loans made by this bank were governed in all instances by special contracts and not by general usage. A copy of the note used by the National Bank of Commerce appears in the stenographer's minutes at pages 233b and 233c.

It was stipulated that the First National Bank makes day loans to its customers, but that as to all loans made by it the brokers enter into a written contract with the bank by which the broker agrees to

hold certain specified securities obtained with the proceeds of the loan in trust for the bank (S. M., p. 234). 953

It was also stipulated that there were a number of other banks in the vicinity of Wall Street which made day loans to their customers "in substantially the same manner as that referred to in the testimony of Messrs. Carse and Alexander, and that if the officers of those banks were called as witnesses they would give testimony that their banks did similar business in substantially the same manner and under the same conditions as testified to by the witnesses Carse and Alexander" (S. M., p. 234). 954

That the Bank of Manhattan Co., a State Bank, certifies checks against which no deposits have been made, such checks being paid off during and before the close of each banking day, and no promissory note or request to loan or agreement is exacted from the broker by said bank (S. M., p. 237).

It was also stipulated "that if the members of the Stock Exchange houses to which said banks made the so-called day or clearance loans were called as witnesses herein each of the said brokers called would testify respectively that the amount of the so-called day or clearance loan was credited to his general account with the bank; that in his general account there was credited the balance he had on deposit with the bank at the opening of the day. \* \* \* That in the course of the day he drew and had certified checks against the said account which were used to pay off demand or time loans and obtain the release of securities held as collateral thereto, or to take up stocks, bonds, 955 or other securities which he had agreed to purchase, or to borrow stock for delivery or for the substitution of securities but it was expected and understood that no portion of the day or clearance loan was used for any purpose other than to clear securities, although the broker is at liberty to draw against the balance standing to the credit of his account in excess of that derived from said day or clearance loan to pay the general expenses of his business and to meet the general obligations thereof. That

957 the securities he received as aforesaid were not kept separate but were mingled with all the other securities coming into his possession in the course of his daily business, and that the said securities were freely and at all times used by him to make deliveries on sales made in the course of his business, or were used as collateral in new demand or time loans or were substituted for other collateral then in demand or time loans" (S. M., pp. 238, 239).

958 This testimony fails to show the existence of any custom by which the securities obtained by the broker with the proceeds of the day loan were pledged as security for any part of such loan.

No witness testifies to such a transaction. Mr. Carse mentions only one case where securities obtained by the day loan were pledged to the Hanover Bank and in that case the pledge was to secure a new demand loan, the proceeds of which were used to pay the day or clearance loan. In all other cases the loans made by the Hanover National Bank were repaid at 959 or before the close of the day upon which they were made.

960 Mr. Alexander was able to mention only one instance where a day loan of the National Bank of Commerce was not paid on the day it was made. In that instance he testified the broker's securities were locked in a vault and Mr. Alexander obtained a paper in the nature of a trust receipt which specified the securities and a new loan was made with which the day loan was paid. The sole purpose of the new loan, Mr. Alexander testified, was to obtain interest thereon over night.

No other instances are cited by any witness where the day loan was not paid on the day it was made.

The conditions, therefore, do not exist out of which any custom or usage could arise. A custom as to securing unpaid debts cannot arise where all debts are promptly paid. If there are no unpaid debts and no debtors in default, there can be no established usage in relation to unpaid debts.

Custom or usage arises out of long continued prac-

tee. It is properly defined as a course of dealing or 961 long established method of practice, a mode of conducting transactions of a particular kind. It is a fact to be proven by witnesses who have had actual experience of the acts out of which custom grows.

Mills v. Hallock, 2 Ed. Chn. 651, 655.

Ames Co. v. Kimball Co., 125 Fed. Rep., 332.

Home Ins. Co. v. Weide, 78 U. S. 438, 439.

In the absence of such testimony as referred to no 962 custom or usage is shown to exist.

In my opinion, however, it is quite clear, considering the purpose for which day loans are made by banks, to Stock Exchange brokers, that no such custom could exist. To have it obligatory upon the broker, either by custom or contract, to pledge with the bank the securities obtained with the day loan, would defeat the purpose of the loan and the intent of the parties making it.

On each day a broker has three classes of contracts 963 to perform :

1. Loans to be paid.
2. Contracts for the purchase of securities.
3. Contracts for the sale of securities.

To perform the first two he needs large sums of money. To perform the third he needs the securities he obtains by performing the first two. He obtains the money that he needs from his bank on his demand note as a day loan; he uses this money to pay for stocks deliverable to him and to pay such loans maturing which are secured by stocks and other securities, and he uses the securities thus obtained to make deliveries of stocks which he has sold. It is clear that if he could first make delivery upon his contracts of sale and obtain the purchase money upon such contracts, he could use the money thus obtained to pay off his loans or to pay for stocks deliverable to him and day or clearance loans would be unnecessary. But this he is unable to do because of the magnitude of the transactions and the fact that the deliveries under 964

965 contracts of sale and contracts of purchase proceed simultaneously.

The learned counsel for the defendant upon his brief says :

“ In New York, securities are deliverable on the day following their sale. The transactions are of such exceptional magnitude, that it would not be possible to conduct the business with the capital of the brokers who are engaged in it. They are enabled to pay for the securities which they purchase only by the proceeds of the securities which they sell. But the deliveries of purchases and sales proceed simultaneously. Consequently, the broker is obliged to obtain temporary credit to pay for the securities deliverable to him, while he is receiving the proceeds of the securities which he is delivering to his purchasers. \* \* \* The resources of private capitalists are obviously unequal to such a strain.”

This is a clear and correct statement of the situation which each day brokers and banks in Wall Street must meet. The broker must have financial assistance to carry out his contracts because “deliveries of purchases and sales proceed simultaneously.”

The day's business must be done between 10 A. M. and 3 P. M., and it is impossible for any one broker to so arrange his business that he may make deliveries 968 upon his contracts to sell before deliveries under contracts to purchase are made to him.

While, therefore, it is necessary for the broker to have financial assistance in the shape of a day loan to pay for stocks delivered to him, it is equally necessary that he have the use of the stocks delivered to him to make deliveries himself. And this the banks making the day loan permit him to do. So far from demanding or requiring that the stocks obtained by the proceeds of the loan shall be delivered as security for the day loan or any part of it, the broker with the consent

of the bank uses such securities to make delivery upon his contracts, and with the money received upon such contracts of sale he pays his day loan. 969

In other words, the result of the day's transactions leads to payment of day loans and not to their security, and such is the understanding and intent of both borrower and lender.

This conclusion is clear from the stipulations made in this case in reference to the testimony of brokers wherein it is agreed that members of Stock Exchange houses if called as witnesses would testify: 970

"That the securities he received as aforesaid were not kept separate but were mingled with all the other securities coming into his possession in the course of his daily business, and that the said securities were freely and at all times used by him to make deliveries on sales made in the course of his business, or were used as collateral in new demand or time loans or were substituted for other collateral then in demand 971 or time loans."

This testimony makes it perfectly clear that the brokers make free use of the securities they obtain with the proceeds of the day loan in their daily business, and that such securities with the consent of the banks are used to make deliveries on contracts of sale or pledged to secure new demand or time loans.

I am unable to see how the day loan could be of any benefit to the broker, unless as the stipulation 972 quoted states the securities obtained by the day loan "were freely and at all times used by him (the broker) to make deliveries on sales made in the course of his business or were used as collateral in new demand or time loans or were substituted for other collateral then in demand or time loans."

While it appears that some of the banks making these day loans take from the broker a note or agreement which specifies the securities to be delivered to the broker, and in some instances an agreement upon

973 the part of the broker to hold such securities in trust for the bank, such agreements are waived daily by the banks in all transactions with the brokers.

It is clear from the testimony of Mr. Alexander that such is the case in loans made by the National Bank of Commerce. In Mr. Alexander's long experience he knew of no instance where the performance of the agreement had been enforced and during that long period with loans amounting daily to many millions of dollars made day after day to the same brokers for the 974 same purpose, the brokers have been permitted to use the securities obtained by such loans to make deliveries under their contracts to sell or to borrow money upon from other banks or individuals using such securities as collateral for the payment of such loans.

The waiver of this part of the contract grows out of the nature of the broker's business and his necessity to have the use of the securities obtained with the day loan. If he could not have the use of such securities, the purpose of obtaining the day loan would be defeated.

975 In my opinion, therefore, no custom or usage is shown to exist between banks in the City of New York and Stock Exchange brokers in reference to day loans whereby the payment of any part of such day loans which may be unpaid at the close of business on the day when said loans were made is to be secured by the pledging of securities obtained by the proceeds of the day loan, as alleged in paragraph of the answer numbered XI.

976 The learned counsel for the defendant also contends that the defendant should be held to be subrogated to the rights of secured creditors of Lathrop, Haskins & Company and entitled to the possession of securities released from loan by the use of the proceeds of the day loan of January 19, 1910.

It appears that four of the six checks of the said firm certified by the defendant on January 19, 1910, aggregating \$500,720.74, were used by the said firm in paying secured loans, and among the securities received by the said firm upon the payment of these loans

were included all the securities so delivered by the said firm to the defendant on January 19, 1910, except the following :

200 shares Hocking Coal & Iron Co.

50 shares common stock of the Missouri, Kansas & Texas R. R. Co.

50 shares Anaconda Copper Co.

50 shares common stock of National Lead Co.

50 shares common stock of U. S. Steel Corporation and

300 shares common stock of Chicago, Rock Island & Pacific Railway Co. 978

100 shares Consolidated Gas Co.

100 shares of common stock of American Smelting & Refining Co.

100 shares New York Central & Hudson River R. R. Co.

Of the above, 300 shares of common stock of the Chicago, Rock Island & Pacific R. R. Co., 100 shares of stock of the Consolidated Gas Co., 100 shares of the common stock of the American Smelting & Refining Co., and 100 shares of stock of the New York Central & Hudson River R. R. Co. were obtained by substituting in their places, as collateral for loans, securities obtained by the said firm upon payment of loans by means of the said certified checks. 979

In my opinion the facts do not entitle the defendant to be subrogated. As I have already stated, it was the intention of the parties that the day loan should be applied to the payment of any indebtedness of the firm maturing on January 19th. The defendant did not know what the existing loans were, and there was, therefore, no agreement that the proceeds of the day loan should be applied to any specific maturing loan. 980

Mr. Albeck testified as follows :

"Q. Now Lathrop, Haskins & Company drew their checks to anybody they pleased against their balances, is that right ?

A. Yes.

Q. And your bank certified those checks up

981 to the amount in full of their actual cash deposits up to the amount of what you credited them with by reason of this loan ?

A. Up to the amount of the credit of that loan, pending the receipt of their deposits.

MR. ELKUS : I move to strike out 'pending the receipt of their deposits.'

THE REFEREE : Answer it.

982 A. Up to the amount of the credit of this large loan pending the receipt of their deposits for securities delivered which had been negotiated—closing transactions of the day before.

Q. Did you know what their transactions were of the day before ?

A. Only in a general way. They told us.

Q. They would say that they wanted so much money to clear ?

A. Yes.

Q. They wanted a day loan of so much cash ?

A. Yes, to clear their loans.

Q. And that is all they told you ; they didn't tell you what the loans were or what securities you were going to get, did they ?

A. They did not.

Q. And all you knew was that they wanted so much money and you either gave it to them or didn't ?

A. Yes, sir."

S. M. pp. 177, 178.

984

There was no agreement express or implied that the defendant should be subrogated to the rights of the creditor whose loan was paid. The firm of Lathrop, Haskins & Company were at liberty to make use of such securities as they obtained in the payment of loans in any way they chose. Upon the payment of the prior loan the securities which were in that way released passed into the hands of Lathrop, Haskins & Company to be used by them freely in their business.

As there was no fraud or misrepresentation in ob-

taining the day loan and no departure by the borrower 985 in the use made of the money from the purpose intended by the parties, there is no equitable rule which would give the defendant a lien on such securities.

If the firm had not failed but had simply neglected to pay the day loan by 3 P. M., there would not be the slightest basis for the application of the doctrine of subrogation, and the fact that the firm became insolvent and became bankrupt does not, of course, change the rights of the parties from what they otherwise would have been.

986

None of the cases cited by the learned counsel for the defendant support his contention.

In Stevens v. King, 84 Me. 291, a vendee of real estate at the request of the vendor paid the consideration for the purchase to certain parties having suits pending against the vendor to enforce liens claimed due to them. After such claims had been paid other parties procured attachments upon the property before the deed was recorded. Held, that the grantee could be subrogated to the ownership of the claims 987 paid.

In Dunlop v. Adams, 174 N. Y., 411, a mortgagee to protect his mortgage was compelled to pay ground rent and taxes which ought to have been paid by the lessee and which he refused to pay. It was held by said payment the mortgagee became an equitable assignee of the lessor's claims paid by him and subrogated to his rights and entitled to maintain the same action against the lessee which the lessor could have maintained.

988

In Atlantic Trust Co. v. Kinderhook R. R. Co., 17 App. Div. 212, nothing applicable to this case was decided.

In Louis v. Bauer, 33 App. Div. 287, it was held that a bank which held a deed of real estate as security for a loan and which advanced money to redeem a prior mortgage was entitled to be paid the amount advanced out of surplus moneys under the rule that one who redeems a security is entitled to be subrogated thereto

989 whether or not a special agreement to that effect was made.

In *Peters v. Mayer*, 72 App. Div. 585, a person who advanced moneys to pay off a first mortgage on real estate and who by mistake was given a new mortgage instead of having the old one assigned to him was held to be subrogated to the rights of the old mortgagee as against a mortgagee who held a second mortgage on the property.

990 In *Gans v. Thieme*, 93 N. Y., 225, the plaintiff had advanced money to executors of one Herman Thieme at their request to pay a mortgage upon real estate owned by said Thieme at his decease and for which he was personally liable. The mortgage was paid and cancelled and a new bond and mortgage was given the plaintiff by the executors which proved not to be a valid lien upon the land. The Court held that the plaintiff was entitled to have the original mortgage restored to the record and be subrogated to the rights of the original mortgagee.

991 In *Pease v. Egan*, 131 N. Y., 262, it was held that a contingent devisee of real estate who advanced money to pay a mortgage on such real estate was entitled as security for the money advanced to the mortgagee which she paid and such devisee having died and the title to the real estate never having vested in her, the plaintiff, who was executrix of her will and sole legatee, was entitled to be subrogated to the rights of the mortgagee.

992 In *Morehouse v. Brooklyn Heights R. R. Co.*, 185 N. Y., 520, it was held that a railroad company which had settled a claim for damages with the plaintiff's client (the plaintiff having a contract with his client to be paid 50% of what was recovered in the action by way of settlement or otherwise) became a surety to the client for the payment of the attorney's fee and the client not having paid the fee, the Company was subrogated to the rights of the client and in an action to recover the fee from the Railroad Company was entitled to avail itself of all the defenses the client had.

In *Title Guarantee & Trust Co. v. Haven*, 196 N. Y., 993 487, the plaintiff paid a forged check drawn upon a depositor's account in the name of an executor of Andrew H. Green, the proceeds of which check were applied to discharge an assessment upon the defendants' lands. It was held that the plaintiff was subrogated to the rights of the City and entitled to enforce said assessment against the lands ; and it appearing that the land had been sold by the defendants free and clear of the assessment and they having received the money, the plaintiff was entitled to a money 994 judgment against the defendants.

In deciding this case the Court said :

" Upon the facts as found by the referee we have here the case of a purely gratuitous payment of assessments, constituting at the time a lien in favor of the City of New York upon lands owned by the defendants, which payment was clearly induced by the fraud and forgery of some party unknown." 995

" It must be distinctly understood that this view is predicated upon the assumption that the payment of the assessment was purely gratuitous and in nowise in discharge of any real or supposed obligation upon the part of the estate of Andrew H. Green or of the unknown forger, but was brought about solely by mistake induced by the forgery."

None of these cases sustain the contention of counsel. 996 *Stevens v. King*, *Dunlop v. Adams*, *Louis v. Bauer*, *Peters v. Meyer*, *Gans v. Thieme* and *Pease v. Egan* are all based upon the familiar rule that if a person stands in such relation to the premises that his interest whether legal or equitable cannot otherwise be adequately protected, the transaction will be treated in equity as an assignment.

*Morehouse v. Brooklyn Heights R. R. Co.* was based upon the doctrine of suretyship. *The Title Guarantee & Trust Co. v. Haven* was based upon a finding of

997 fraud practiced upon the plaintiff of which the defendants had received the benefit.

In the case at bar none of these elements exist. The defendant in making the day loan received precisely what it contracted for and its rights are expressed in the promissory note which was delivered to it.

When a person pays the debt of another and is held to be subrogated to the rights of the creditor whose debts are discharged, the debt, although paid and satisfied in form, is regarded in equity as still existing; but by operation of law the former holder ceases to be the creditor, while the person paying takes his place as owner of the debt and security unimpaired.

Arnold v. Green, 116 N. Y., 566.

In this case it was the intent of the parties that the debts for which the securities in question were pledged should be paid with the proceeds of the day loan and when paid that the securities should be released from 999 the lien theretofore existing upon them. Thereafter the borrowers were free to sell or pledge these securities, and there is no rule of equity by which the debt paid or the loan which was discharged can be reinstated.

What I have already said disposes of the final claim of the defendant that its superior equity over other creditors must be recognized.

The defendant had no lien upon the securities in question, and at the time of the delivery of the securities to its agents it had no pre-existing right to a lien thereon. Its right to a lien was defined in the demand notes delivered to it by the said firm and did not include the right to a lien upon securities obtained by the firm with the proceeds of the day loan.

In Sexton v. Kessler, 172 Fed. Rep., 535, cited by the learned counsel for the defendant, there was a pre-existing agreement under and pursuant to which certain securities were actually set apart and separated from the other property of the debtor and appropriated to the security of the debtor.

This act under the agreement the Court held to be 1001 in the nature of a mortgage upon the securities in favor of the creditor, valid against the trustee in bankruptcy without an actual change of possession.

Hurley v. Atchison, Topeka & Santa Fe R. R. Co., 213 U. S., 126, did not involve securities for the loan of money at all, but an advance payment for coal agreed to be mined and delivered to the Railroad Company. The Supreme Court held this appropriation to be in equity a pledge or hypothecation of unmined coal to the extent of the payment made, with which the 1002 trustee in bankruptcy equally with the bankrupt was bound to comply.

Neither of the cases cited have anything in common with the transaction presented in the case at bar, which was a loan of money upon terms clearly expressed in the notes of the borrower and which gave the defendant no right to the specific securities in question.

In my opinion the transfer of said securities by the said firm to the said defendant on January 19, 1910, 1003 constituted a preference as defined in § 60 of the Bankrupt Law. That the transfer was voidable by the complainant and he is entitled to a decree in accordance with the prayer of the complaint, that the defendant deliver to him the said securities and pay to him the interest and dividends collected upon said securities by the defendant with interest upon said dividends and interest collected from the date of the receipt thereof, as set forth in the schedule hereinbefore referred to, and in default of such delivery that 1004 the complainant have judgment against the defendant for the sum of \$161,740.62 with interest on \$154,300 from the date of this report, and on the interest and dividends collected as aforesaid from the date of the receipt thereof as set forth in said schedule.

I have been requested by the defendant to find upon certain special requests. I am doubtful as to my power to pass upon these requests under the order of reference. Some of them I have included in my

**1005** opinion among the facts which I deem established by the testimony.

I have, however, written my conclusions upon the margin of the requests and attach the paper hereto as a part of my report.

All of which is respectfully submitted.

Dated October 17th, 1911.

CHARLES F. BROWN,  
Special Master.

**1006**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

**1007**

<b>HENRY D. HOTCHKISS, as Trustee, &amp;c.,</b>  <b>AGAINST</b>  <b>NATIONAL CITY BANK.</b>	<b>Requests to Find.</b>
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The defendant requests the Special Master to find as follows:

I.

**1008** The defendant was, at all the times hereinafter mentioned, and is a national bank, incorporated under the laws of the United States of America and having its principal place of business at No. 55 Wall St., in the Borough of Manhattan, City and State of New York.

Found. C. F. B.

II.

On January 19, 1910, and for some two years prior thereto, Henry S. Haskins, Henry Leverich and Fannie G. Lathrop were co-partners doing business as stock-

brokers in the City of New York under the firm name 1009 of Lathrop, Haskins & Company, the said Henry S. Haskins being a member of the New York Stock Exchange.

Found. C. F. B.

### III.

On January 19, 1910, at about 4:10 P. M., a petition in involuntary bankruptcy was duly filed against the said partners, individually and as such co-partners, in 1010 the office of the Clerk of the United States District Court for the Southern District of New York, and such proceedings had thereon that thereafter Henry S. Haskins and Henry Leverich, individually, and Fannie G. Lathrop, as special partner, and the firm of Lathrop, Haskins & Company were duly adjudged bankrupts. All proceedings in connection with such bankruptcy were duly referred to the Hon. STANLEY W. DEXTER, as Referee, and the complainant was duly appointed Trustee in bankruptcy of the said bankrupts and has 1011 duly qualified as such.

Found. C. F. B.

### IV.

The firm of Lathrop, Haskins & Company, during its existence, had a single bank account, which was with the defendant, and the said firm and its predecessors had, for several years prior to January 19, 1910, dealt with the defendant as their banker.

Found. C. F. B.

1012

### V.

According to the general usage among stock brokers dealing through the New York Stock Exchange, stocks and bonds sold are deliverable on the next business day after the sale, payment being made upon delivery. Ordinarily the stocks and bonds sold by a broker have been pledged by him as security for loans, and to obtain them for delivery the broker is obliged

**1013** to pay such loans, or so much thereof as is necessary to release such stocks and bonds.

Found. C. F. B.

## VI.

In order to obtain funds to make such deliveries and to pay for stocks and bonds purchased, pending the delivery of the same to their customers or the arranging of loans thereon, a general custom exists **1014** among such brokers to obtain from their bankers each business day a loan or extension of credit called a day or clearance loan. Such loan is made by the bank's crediting the account of the broker with the amount of the loan and certifying the checks of the broker against his account. Such clearance loans are usually evidenced by demand notes, but it is the established custom that the loan is in any event payable before the close of the day, without a special demand.

Found. C. F. B.

**1015**

## VII.

In obtaining such a loan, according to the general custom, the broker agrees to use the credit so extended exclusively to make his clearances for the day, as described in defendant's requests to find numbered V. and VI.

Refused. C. F. B.

## VIII.

**1016**

In obtaining such a loan, according to the general custom, the broker agrees to deposit promptly with the banker the amounts received for deliveries made and to hold such amounts, until deposited, and the stocks and bonds obtained by means of such loan, or their proceeds, in trust for the banker for the repayment of such loan.

Refused. C. F. B.

Defendant's Requests to Find. 255  
1017

IX.

Prior to January 19, 1910, the firm of Lathrop, Haskins & Company and its predecessors had, for many years, been accustomed to obtain from the defendant each business day a clearance loan, such as is described in defendant's request to find numbered VI., which had in every case been repaid on the same day.

Found. C. F. B.

X. 1018

In obtaining the said loans, the firm and its predecessors had made with the defendant the agreements described in defendant's requests to find numbered VII. and VIII.

Refused. C. F. B.

XI.

On the morning of January 19, 1910, the said firm 1019 applied for and obtained from the defendant, in the usual manner, a clearance loan of \$500,000, evidenced by two demand notes in the usual form, being plaintiff's Exhibits 11 and 12.

Found. C. F. B.

XII.

The amount standing to the credit of the firm on deposit with the defendant at the opening of business on January 19, 1910, was \$54,319.98. Against 1020 this credit, as increased by the clearance loan of \$500,000, the defendant certified and subsequently paid six checks drawn by the said firm, aggregating \$535,920.74. During the day the said firm deposited with the defendant \$374,845.80. Three checks aggregating \$9,411.73, previously deposited by the said firm with the defendant and credited to their account, were not paid and were thereafter charged against their account by the defendant.

Found. C. F. B.

1021

## XIII.

At the opening of business on January 19, 1910, the said firm was solvent and its assets, taken at a fair valuation, exceeded its liabilities by at least the sum of \$400,000.

Found. C. F. B.

## XIV.

1022 On that day the said firm owned large amounts of the stock and bonds of the Columbus & Hocking Coal & Iron Company. The market value of the common stock of said Company had for at least three months prior to January 19, 1910, been at least \$80 a share, and the market value of the bonds of said Company during the same time had been at least par.

Found. C. F. B.

## XV.

1023

On that day the market price of the common stock of the Columbus & Hocking Coal & Iron Company declined from above \$80 a share to \$25, standing at \$33 at the close of business on that day.

Found. C. F. B.

## XVI.

1024 By reason of this decline, the said firm was unable to meet its obligations and its suspension was announced upon the New York Stock Exchange shortly after noon on January 19, 1910.

Found. C. F. B.

## XVII.

*Between 2 and 3*

[At about 2:15 P. M.] on January 19, 1910, the said firm delivered to the defendant the securities mentioned in Schedule A annexed to the bill of complaint.

Found as altered. C. F. B.

1025

## XVIII.

Four of the six checks of the said firm certified by the defendant on January 19, 1910, aggregating \$500,-720.74, were used by the said firm in paying secured loans, and among the securities received by the said firm upon the payment of these loans were included all the securities so delivered by the said firm to the defendant on January 19, 1910, except the following:

200 shares Hocking Coal & Iron Co.	1026
50 " common stock of the Missouri, Kansas & Texas R. R. Co.	
50 " Anaconda Copper Co.	
50 " common stock of National Lead Co.	
50 " " " U. S. Steel Corporation	

and

300 " common stock of Chicago, Rock Island & Pacific Ry. Co.	
100 " Consolidated Gas Co.	1027
100 " of common stock of the American Smelting & Refining Co.	
100 " New York Central & Hudson River R. R. Co.	

Of the above, 300 shares of the common stock of the Chicago, Rock Island & Pacific R. R. Co., 100 shares of stock of the Consolidated Gas Co., 100 shares of the common stock of the American Smelting & Refining Co., and 100 shares of stock of the New York Central & Hudson River R. R. Co. were obtained by substituting in their places, as collateral for loans, securities obtained by the said firm upon payment of loans by means of the said certified checks.

Found. C. F. B.

## XIX.

At the time of such delivery, a balance of at least \$116,166.69 was due from the said firm to the defend-

1029 ant and the securities were delivered by the said firm and received by the defendant in good faith to secure the payment of the amount which it owed to the defendant and without fraudulent intent.

I find this except I find that the firm intended in such delivery to prefer the defendant over its other creditors. C. F. B.

## XX.

1030 The said securities were delivered to the defendant, pursuant to the agreement made by the said firm when the clearance loan was obtained on January 19, 1910.

Refused. C. F. B.

## XXI.

The securities so delivered to the defendant, which had been obtained by the said firm through the use of the said checks certified by the defendant on January 19, 1910, or by the substitution of securities so obtained, were delivered to the defendant pursuant to the said agreement.

Refused. C. F. B.

## XXII.

In delivering the said securities to the defendant, the said firm and its members did not intend to prefer the defendant over other creditors.

1032 Refused. C. F. B.

## XXIII.

Neither the defendant nor its officers, who received the said securities, had reasonable cause to believe that it was intended by the delivery of said securities to give a preference.

Refused. C. F. B.

XXIV.

At the time of said delivery, no other creditor of the said firm had any lien upon the securities delivered.

Refused. C. F. B.

XXV.

At the time of said delivery, no other creditor had 1034 extended credit to the firm, relying upon its apparent ownership of the said securities.

Refused on the ground there is no testimony on the subject. C. F. B.

XXVI.

At the time of said delivery, there was no other creditor of the said firm of the same class as the defendant, within the meaning of Section 60 of the 1035 Bankruptcy Act.

Refused. C. F. B.

XXVII.

All the other creditors of the said firm knew, or are chargeable with knowledge, of the general usages in accordance with which the business of the firm was conducted.

Refused. C. F. B. 1036

XXVIII.

By the use of the credit extended to the said firm through the said clearance loan, the firm obtained securities worth at that time at least 18 per cent. more than the amounts paid by it to obtain them.

Refused. C. F. B.

1037

## CONCLUSIONS OF LAW.

## I.

The defendant is subrogated to the rights of the pledgees from whom the firm of Lathrop, Haskins & Company obtained the securities delivered to the defendant on January 19, 1910, so far as such securities were obtained by the use of the checks of the firm certified by the defendant on that day, or by the substitution of securities so obtained for securities so delivered.

1038  
Refused. C. F. B.

## II.

The defendant is entitled to retain the securities mentioned in Schedule A, annexed to the bill of complaint, as security for the payment of the amount due to it from the said firm.

1039  
Refused. C. F. B.

## III.

The bill of complaint should be dismissed, with costs.

Refused. C. F. B.

1040

Stipulation.

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**Stipulation as to Value of Securities on  
October 17, 1911.**

UNITED STATES DISTRICT COURT,

1042

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee,  
etc.,  
Complainant,

AGAINST

NATIONAL CITY BANK,  
Defendant.

1043

It is hereby stipulated by and between the solicitors for Complainant and solicitors for Defendant in the above-entitled cause that at the opening of the market on the 17th day of October, 1911, the Stock Exchange quotations of the securities in suit, which said quotations set forth the prices for which similar securities were purchased and sold in open market on the New York Stock Exchange at the time mentioned, were as follows:

1044

		Stock Ex. Quo. Oct. 17, 1911.	Total
<b>1045</b>	Securities delivered to Natl. City Bank.		
200 Southern Pacific	109	\$21,800.00	
200 Reading, Com.	69 $\frac{3}{4}$	13,837.50	
100 N. Y. Central & Hud.	105	10,500.00	
300 Rock Island Com.	24 $\frac{1}{2}$	7,462.50	
100 Cons. Gas.	138	13,800.00	
100 Am. Smelt. & Ref.	65 $\frac{3}{4}$	6,537.50	
300 Mo. K. & T.	31 $\frac{1}{2}$	9,375.00	
100 Wabash Com.	12 $\frac{1}{2}$	1,250.00	
<b>1046</b>	250 Anaconda	33 $\frac{1}{2}$	8,312.50
100 Tex. Pac.	24 $\frac{1}{2}$	2,450.00	
100 Nat. Lead Com.	48	4,800.00	
50 U. S. Steel Com.	59 $\frac{1}{2}$	2,956.25	
10 Union Pac. 4's Conv.	102 $\frac{1}{2}$	10,212.25	
	(3 mos. 17 ds. Int.)	118.89	
100 Kan. City So. Com.	28 $\frac{3}{4}$	2,875.00	
200 Hock. Coal & Iron	no value		

Total as per Stock Exchange

**1047** Quotations October 17, 1911 \$116,287.39

It is further agreed that this stipulation be incorporated in and made part of the record in this cause.

Dated, New York, October 20th, 1911.

ABRAM I. ELKUS & WM. S. MCGUIRE,  
Solicitors for Complainant.

SHEARMAN & STERLING,  
Solicitors for Defendant.

**1048** [ENDORSED:] "U. S. District Court, S. D. of N. Y.  
Filed Oct. 26, 1911."

1049

**Notice of Motion to Confirm Report of  
Special Master.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as trustee, etc.,  
Complainant,  
AGAINST  
NATIONAL CITY BANK,  
Defendant.

1050

1051

SIRS:—Please take notice that the report of the Hon. CHARLES F. BROWN, Special Master, in the above-entitled suit, has been duly filed in the Office of the Clerk of the United States District Court for the Southern District of New York on the 17th day of October, 1911, and that upon the said report and the exception thereto by the complainant, dated the 26th day of October, 1911, and upon the stipulation entered into by the parties to this cause, dated the 24th day of October, 1911, filed in the office of the Clerk of this Court on the 26th day of October, 1911, setting forth the interest and dividends received by the defendant on the securities in suit and the stipulation entered into by the parties to this cause, dated the 20th day of October, 1911, and filed in the office of the Clerk of this Court on the 26th day of October, 1911, setting forth the stock exchange quotations on the securities in suit as of the 17th day of October, 1911, the undersigned will move this Court at a Stated Term thereof to be held in the Post Office Building in the Borough of Manhattan, City of New York, on the 30th day of October, 1911, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order confirming the said report of the Special Master, dated the 17th day of October, 1911, except as

1052

**1053** set forth in the exception thereto taken by the complainant as aforesaid, and for a decree directing that the complainant have judgment against the defendant for the sum of One hundred sixty-two thousand four hundred forty &  $\frac{62}{100}$  (\$162,440.62) dollars, with interest on One hundred fifty-four thousand three hundred (\$154,300.00) dollars from the 17th day of October, 1911, and on the interest and dividends from the date of the receipt thereof and for such other and further relief as to the Court may seem just and equitable in  
**1054** the premises.

Dated, New York, October 26th, 1911.

Yours, &c.,

ABRAM L. ELKUS and WILLIAM S. MCGUIRE,  
Solicitors for Complainant,  
Office & Post Office Address,  
No. 170 Broadway,  
Borough of Manhattan,  
City of New York.

To MESSRS. SHERMAN & STERLING,  
**1055** Solicitors for Defendant, No. 55 Wall Street,  
Borough of Manhattan, New York City.

1057

**Complainant's Exceptions to Report of  
Special Master.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee, etc., Complainant,  AGAINST  NATIONAL CITY BANK, Defendant.	} 1058
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SIRS :—

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Please take notice, that the complainant excepts to that portion of the report of the Hon. CHARLES F. BROWN, Special Master, in the above-entitled suit, dated the 17th day of October, 1911, in which the said Special Master finds as follows :

“ \* \* \* \* that the defendant deliver to him (the complainant) the said securities and pay to him the interest and dividends collected 1060 upon said securities by the defendant with interest upon said dividends and interest collected from the date of the receipt thereof, as set forth in the schedule hereinbefore referred to, and in default of such delivery that the complainant have judgment against the defendant for the sum of \$161,740.62 with interest on \$154,300. from the date of this report, and on the interest and dividends collected as afore-

1061 said from the date of the receipt thereof as set forth in said schedule (Schedule A1 annexed to the stenographer's minutes)."

Dated, New York, October 26th, 1911.

Yours, etc.,

ABRAM I. ELKUS,

and

WILLIAM S. MCGUIRE,  
Solicitors for Complainant,

1062      Office & Post Office Address,  
                No. 170 Broadway,  
                Borough of Manhattan,  
                City of New York.

To MESSRS. SHEARMAN & STERLING,  
Solicitors for Defendant, Office & Post Office  
Address, No. 55 Wall Street, Borough of  
Manhattan, City of New York.

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**Defendant's Exceptions to Report of Special Master.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee,  
&c.,

AGAINST

NATIONAL CITY BANK.

1066

Exceptions.

And now comes The National City Bank of New York, the defendant, and excepts to the report of the Hon. CHARLES F. BROWN, the Special Master, filed in this cause on October 18, 1911, and for cause of exception shows:

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FIRST: That the Master has, in said Report, stated and certified that at the time of the delivery to the defendant of the securities referred to in the bill of complaint, the firm of Lathrop, Haskins & Co. and the individual members thereof were insolvent; whereas, there is no competent evidence of the liabilities nor of the fair value of the assets of the said firm, and the Master should have found that, so far as appears, at the time of the delivery of the said securities, the aggregate of the property of said firm, exclusive of any property which it had conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay its creditors, was, at a fair valuation, sufficient in amount to pay its debts, since the testimony of Mr. Henry S. Haskins showed that the Columbus & Hocking Coal & Iron Co. owned valuable properties and the Master has found that the market price of its common

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1069 stock had, for some months prior to January 19, 1910, been upwards of \$80 per share.

SECOND: That the Master has, in said Report, stated and certified that the defendant is in the class of general creditors of the said firm and that the effect of the transfer of said securities would be to enable the defendant to obtain a greater percentage of its debt than other creditors of the same class; whereas, the Master should have found that, in view of the peculiar relations existing between the said firm and the de-

1070 fendant, there are no creditors of the said firm of the same class as the defendant, within the meaning of Section 60 of the Bankrupt Act.

THIRD: That the Master has, in said Report, stated and certified that at the time of the delivery of said securities to Messrs. Albeck and Kilborn, the representatives of the defendant, they were informed by the counsel of the said firm that the delivery of the said securities was a preference of the defendant over other creditors; whereas, such finding is based wholly upon 1071 the testimony of the said alleged counsel, an incompetent and interested witness, and the Master should have found, from the testimony of Messrs. Albeck and Kilborn, that the counsel for the said firm advised that the defendant was lawfully entitled to the said securities; and the Master should have found, upon the testimony of the said witnesses, that the said securities were delivered to the defendant pursuant to such advice.

FOURTH: That the Master has, in said Report, stated 1072 and certified that, at the time the said securities were delivered, the representatives of the defendant knew that the said firm and the individual members thereof were insolvent, and had reasonable cause to believe that it was intended by said firm, in the delivery of the said securities, to give the defendant a preference; whereas, the Master should have found that the said firm and the members thereof had no actual intention of giving the defendant a preference and that the representatives of the defendant did not have reasonable cause to believe and did not believe that a preference

was intended ; and the Master should also have found 1073 that the said securities were delivered by the said firm and received by the defendant in good faith, under the honest belief that the defendant was lawfully entitled to demand and receive the same as security for the indebtedness then owing to it by the said firm ; which facts were established by the testimony of the witnesses Kilborn, Albeck, Carse, Alexander and the stipulated testimony of other bankers and brokers.

FIFTH : That the Master has, in said Report, stated and certified that there was no agreement between the 1074 said firm and the defendant applicable to the clearance loan made by the defendant to the said firm on January 19, 1910, whereby any balance of the said loan not paid in full at the close of the day should be secured by the securities obtained by the said firm with the proceeds of the said loan ; whereas, the Master should have found that, in accordance with the general custom and usage existing between firms of brokers having membership in the New York Stock Exchange and their banks and the long continued course of business between the 1075 said firm and the defendant, the said clearance loan was not regarded by the said firm and the defendant as an unsecured extension of credit, but it was well understood and agreed between said firm and the defendant that such loan should be secured by the securities obtained by the said firm by means of such loan and the proceeds of such securities, and that, according to the usage prevailing and universally recognized in the City of New York in connection with such clearance loans, the said firm was allowed to retain such securities for use in the ordinary course of its business, but only upon condition that the proceeds of such securities should be promptly deposited with the defendant and the said clearance loan paid in full or fully secured before the close of business on the same day ; and that, at the time of the delivery to the defendant of the securities referred to in the bill of complaint, the said firm and the defendant believed that, pursuant to the said understanding and course of business, the defendant had the legal right to demand and receive the said 1076

**1077** securities and that the said firm was obligated to deliver such securities, or their proceeds ; and the Master should have found that the said securities were delivered and received in good faith pursuant to such understanding, usage and course of business ; all of which facts were clearly established by the testimony of the witnesses Kilborn, Albeck, Carse and Alexander, and the stipulated testimony of other bankers and brokers.

**SIXTH :** That the Master failed and refused to find **1078** the facts set forth in defendant's Seventh Request to Find, annexed to the Master's Report ; whereas, the evidence established such facts and the Master should have found the same.

**SEVENTH :** That the Master failed and refused to find the facts set forth in defendant's Eighth Request to Find, annexed to the Master's Report ; whereas, the evidence established such facts and the Master should have found the same.

**EIGHTH :** That the Master failed and refused to find **1079** the facts set forth in defendant's Tenth Request to Find, annexed to the Master's Report ; whereas, the evidence established such facts and the Master should have found the same.

**NINTH :** That the Master failed and refused to find the facts set forth in defendant's Nineteenth Request to Find, annexed to the Master's Report ; whereas, the evidence established such facts and the Master should have found the same.

**TENTH :** That the Master failed and refused to find **1080** the facts set forth in defendant's Twentieth Request to Find, annexed to the Master's Report ; whereas, the evidence established such facts and the Master should have found the same.

**ELEVENTH :** That the Master failed and refused to find the facts set forth in defendant's Twenty-first Request to Find, annexed to the Master's Report ; whereas, the evidence established such facts and the Master should have found the same.

**TWELFTH :** That the Master failed and refused to find the facts set forth in defendant's Twenty-second

Request to Find, annexed to the Master's Report ; 1081 whereas, the evidence established such facts and the Master should have found the same.

THIRTEENTH : That the Master failed and refused to find the facts set forth in defendant's Twenty-third Request to Find, annexed to the Master's Report ; whereas, the evidence established such facts and the Master should have found the same.

FOURTEENTH : That the Master failed and refused to find the facts set forth in defendant's Twenty-fifth Request to Find, annexed to the Master's Report ; 1082 whereas, the evidence established such facts and the Master should have found the same.

FIFTEENTH : That the Master failed and refused to find the facts set forth in defendant's Twenty-sixth Request to Find, annexed to the Master's Report ; whereas, the evidence established such facts and the Master should have found the same.

SIXTEENTH : That the Master failed and refused to find the facts set forth in defendant's Twenty-seventh Request to Find, annexed to the Master's Report ; 1083 whereas, the evidence established such facts and the Master should have found the same.

SEVENTEENTH : That the Master failed and refused to find the facts set forth in defendant's Twenty-eighth Request to Find, annexed to the Master's Report ; whereas, the evidence established such facts and the Master should have found the same.

EIGHTEENTH : That the Master failed and refused to find the First Conclusion of Law contained in said Requests to Find ; whereas, such conclusion of law 1084 followed from the facts established by the evidence.

NINETEENTH : That the Master failed and refused to find the Second Conclusion of Law contained in said Requests to Find ; whereas, such conclusion of law followed from the facts established by the evidence.

TWENTIETH : That the Master failed and refused to find the Third Conclusion of Law contained in said Requests to Find ; whereas, such conclusion of law followed from the facts established by the evidence.

TWENTY-FIRST : That the Master, in the trial of the

**1085** cause, permitted, over objections and exceptions taken at the time, as shown by the record, the schedules of the assets and liabilities filed by the said firm in the bankruptcy proceedings to be admitted in evidence, when in fact the said schedules were not admissible, because the same were incompetent and hearsay, being the declarations of third persons.

**TWENTY-SECOND:** That the Master has, in said Report, stated and certified that the delivery of the said securities to the defendant constituted a preference **1086** voidable by the complainant under Section 60 of the Bankrupt Act, and that the complainant is entitled to a decree in accordance with the prayer of the complaint; whereas the Master should have found that the defendant is entitled to hold the said securities as security for the payment of the amount owing to it by the said firm, with interest.

New York, November 17, 1911.

SHEARMAN & STERLING,  
Solicitors for the defendant,

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55 Wall Street,  
New York City.

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**Opinion of Hand, J., Confirming Report  
and Ordering Accounting.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee, etc.,

AGAINST

THE NATIONAL CITY BANK OF  
NEW YORK.

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R. F. LEVIS, for the complainant.

JOHN A. GARVER, for the defendant.

HAND, District Judge:

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I do not think it necessary to add anything to the referee's report except upon two questions: first, the need of proving that the defendant knew that the bankrupts intended a preference; second, the defense of an equitable lien.

Upon the first point *Alexander vs. Redmond*, 180 Fed. R., 92, is conclusive. It is idle to say that the opinion is *obiter*. I tried the case below and being of different opinion decided it expressly because the element of an intent to prefer was lacking. The reversal was therefore expressly upon that point and the case settles the law in this Circuit.

The second point is without doubt difficult and requires careful analysis into the difference of intention between an obligation and a property right, which closely approach each other under these circumstances. I shall assume two things which are at least not conceded. First, I assume that the written contracts may be varied by proof of a custom; second, that the custom would be valid if it existed and

1093 actually gave a lien upon the assets. What then is the defendant's position? It is this: Under the custom of banks and brokers, first, the certified cheques when withdrawn from the bank, remain in equity still the bank's property, call the right a trust or whatever you will; second, the broker may use them only to relieve securities, either pledged or purchased, from liens upon them for money lent, or for purchase price due; third, the securities when the broker receives them are subject to an equitable lien equal in amount to the bank's advances upon them; and that lien remains not only upon them but upon any money or other property which the broker may get by pledging or by selling them, so that if the broker, having sold the released securities, reinvests the moneys, the lien would remain upon the new securities so purchased. In other words, the actual intention of the parties here effects, the defendant says, what the law would itself impose, if the funds were at any time in the hands of the broker affected with an equitable lien

1094 or an implied or constructive trust. Now this is a perfectly intelligible position, whether or not it be a sound one, and I must concede to the defendant that it does not seem to me to be an answer merely to show that the broker is free to pledge or sell the securities released with the bank's money, because if the custom contemplated his doing so, and also contemplated that the proceeds of such a sale or pledge should themselves be subject to the same lien, then it would not be an objection to show that the broker could in fact sell

1095 the securities.

On the other hand, all that actually takes place is consistent with the absence of any lien whatever, and with merely a restriction upon the use of the cheques to the release of securities, and a strict requirement that the loan be paid at the close of the day. Nothing which the brokers do indicates that they regard the property in their hands as subjected to any lien, because it is not enough that they are restricted in the use of the funds. For example, A. may lend B. money only on condition that B. put it in his business; A.

would have no lien. Even if B. were to promise A. to 1097 pay him out of the funds in his business, A. would have no lien. *Dillon vs. Barnard*, 21 Wall. 430; *Franklin vs. Browning*, 117 Fed. R., 226; *Barrington vs. Evans*, 3 Y. and C. 384. Justice CLIFFORD says in *Dillon vs. Barnard*, on page 439, that there must be "some act of appropriation on the part of the employer" (the promisor) "depriving himself of the control of the funds, and conferring upon the contractor" (the promisee) "the right to have them applied to his payment when the services are rendered or the materials 1098 are furnished. There must be a relinquishment by the employer of his right of dominion over the funds, so that without his aid or consent the contractor can enforce their application to his payment when his contract is completed." Nothing in the practice of the parties justifies any such inference as that indicated.

A lien means that the lienor is to have the right to take his debt out of some specified *res*, which may, it is true, be a changing fund, but nevertheless must be 1099 ascertainable since it is a property right. To take out one's debt from a *res* is a very much more stringent right than to restrict the borrower's rights in the money you lend him, or even to promise to pay him from a fund. It seems hardly necessary to elaborate so obvious a distinction. *Walker vs. Brown*, 165 U. S., 554. Again, the necessity of paying back the loan by three o'clock does not indicate that the bank meanwhile has any lien upon the funds, especially as the sources of payment are, naturally enough, indifferent 1100 to the bank itself. Nor is it significant that the bank should be interested in the kind of security in which the broker deals, because the loan represents so large a part of the broker's indebtedness that its proceeds will for the time being be the greater part of his assets. Further, the need of beginning to pay back the loan by twelve o'clock, shows nothing, though the evidence really shows that the brokers have till three to begin to pay, because a creditor is under such circumstances naturally apt to suspicion if the debtor remains longer

1101 than necessary with so large a load of indebtedness. Indeed, the belief of a lien upon the broker's assets would rather tend to less close scrutiny of the time of his repayments.

While, therefore, the use of the funds by the broker does not necessarily preclude the existence of a lien, there is nothing in the practice of the business which at all requires it to be interpreted in such terms. It is quite true that these "clearance" loans are merely to enable brokers to shift about securities, but while 1102 they are shifting them, they may hold them free and clear or they may hold them subject to liens for the price. No one can *a priori* say which is more likely, and in the absence of some express provision covering the case the only interpretation which can be safely made is from the practice. Furthermore, the only occasion in practice which would throw any light would be when the question arose as to the bank's rights between the time when the cheques were certified and the loan paid. Such an occasion 1103 never arises and so the custom does not help. If there had been instances in which the bank exercised a right as lienor during that period and the broker assented, they would be material, but there are none. Even the single case which Alexander remembers in which the broker gave security over night proves nothing, because the necessity would have been the same whether or not the "clearance" loan had been secured by a lien; because the "clearance" loan will be in any case and the broker must pay it by 1104 taking out a call loan with collateral somewhere, whether or not it had been secured theretofore.

All the evidence of custom therefore seems to me not to help the defendant in the least; on the other hand some of it seems to injure its cause. For instance if the brokers kept the "clearance" loan securities separate, or in any way distinguished the bank's supposed property from their own, there might be color for the claim of a lien, but unfortunately for the bank they mix everything indiscriminately. Now it is still possible that the lien is to be regarded as existing

even when for motives of convenience it is not kept defined, but upon the balance of probabilities the absence of any distinction must weigh. It would also be some evidence of intent if the "clearance" funds were not mingled with the other funds in one deposit confessedly within the broker's power to use as he wishes, but they are so mingled. Again, a strong evidence of the intention of the bank is that they so expressly, and with exuberant verbiage, reserve liens upon all securities in their possession; *expressio unius exclusio alterius*. Contrast the note used by the Bank of Commerce, which reserves a lien upon all the securities while in the hands of the brokers which were purchased out of the proceeds of the loan. Of course, neither of these notes is conclusive, but each indicates that when the banks intended such an agreement they knew how to express it, and that in the case at bar the defendant expressed quite clearly a lien depending upon possession. The most reasonable understanding of the relation between the parties is that the bank relied upon the good faith of the broker to pay his loan and not to use his funds improperly, but that it had occurred to no one to consider what was the position of the bank, if the brokers should fail before the loan was paid. If that occurred it seems to me incredible that with no practice to go by, they should have left the matter without definition. The forms of the relations are all those of debtor and creditor, the practice under it sheds no light as I have said, for obviously the banks could not exercise the rights of a lienor until there was some occasion to assert a preference. It seems pretty clear to me that the present assertion is no more than a favorable interpretation, which has no foundation in usage or expression. The bank itself, when asserting the lien, made no attempt to get only such securities as its funds had released, but gathered up all that came handy, among them stocks which had never been released by its funds, or by the substitution of securities released by such funds. It is impossible to see how from any point of view such securities were subject to a lien. The point is

1109 important only as showing that in practice the bank simply laid its hands on what it could get like any other creditor seeking an illegal preference, and that its supposed lien must have been at the time ambulatory over the whole assets of the bankrupt estate. Such a practical construction of the bank's rights is of substantial importance when the question is of the interpretation of a practice or custom.

The testimony of Carse goes a little further than the actual practice of the brokers and the bank. He in

1110 one place characterizes the relations between the two and states what they understood the legal status to be. Thus, he says on his direct examination: "it has developed a form of trust, and the clear understanding implied between the broker and the bank is that whatever the broker obtains by the proceeds of the loan given to him is held in trust for the account of the bank. \* \* \* If a broker pays for stocks or bonds it is the understanding of the bank that they belong to them as collateral to their loan, and the broker simply

1111 retains possession of them long enough to make delivery and get payment," etc. Now if this witness's interpretation of the legal effect of the custom is to stand for the court's, of course, the master's decision as to the meaning of the custom is wrong, for then it is an out and out trust, disappearing into an equitable lien, upon payment of the certified cheques to another bank and receipt of securities in exchange. But such an interpretation is not competent evidence at all, since it in effect usurps the court's function,

1112 which is to decide what was the "clear understanding." Moreover, it is of no consequence for another and deeper reason; a contract has, strictly speaking, nothing to do with the personal or individual intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words intended something else than the usual meaning which the law imposes

upon them, he would still be held, unless there were 1113 some mutual mistake or something else of the sort. Of course, if it appear by other words, or acts, of the parties that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent. Now in the case at bar, whatever was the understanding in fact of the banks, and of the brokers, too, for that matter, of the legal effect of this practice between them, it is of not the slightest consequence unless it 1114 took form in some acts or words, which, being reasonably interpreted, would have such meaning to ordinary men. Of course, it will be likely that if they both do understand their acts in the same way, usual men would have done so, too. Yet the question always remains for the court to interpret the reasonable meaning to the acts of the parties, by word or deed, and no characterization of its effect by either party thereafter, however truthful, is material. The rights and obligations depend upon the law alone. 1115

When, therefore, Carse says what is the clear understanding of the legal effect of the practice, it is of no consequence, since that understanding was expressed only in acts, the natural meaning of which does not imply any trust relation, as he, and perhaps they, may have supposed. Had they said that they meant to create a trust, such a trust would arise; but when they merely adopted a course of conduct, the supposed results of that conduct are immaterial. I have therefore wholly disregarded this portion of 1116 Carse's testimony.

The question of subrogation is easily disposed of. There is no subrogation unless the money used to pay the claim kept alive by subrogation was money on which the party subrogated had in equity some claim, charge or lien. I think there are no cases in which the payment of money in discharge of a claim allows of subrogation when the money was in all senses that of the man who paid the obligation. In other words, if the bank had some kind

1117 of equitable lien on the checks in the hands of the broker, it would certainly be entitled to be subrogated, but not if those funds were the funds of the broker in every sense. It is of course true that in *Hurley vs. Atchison, Topeka and Santa Fe Railroad*, 213 U. S., 126, the court went a long way to sustain the equity of a claimant in bankruptcy, but I think it quite clear that the reason was this: the money which the road paid in advance for coal was the purchase price of an agreed quantity of coal, actually in existence. It was  
1118 meant to give the road the right to demand from the seller a certain amount of coal actually in its possession which, though not yet set apart from the bulk, was still definable in quantity. That was a specific interest in a *res* which survived bankruptcy.

It hardly seems worth while to consider *Sexton vs. Kessler*, 172 Fed. R., 535, in which there was a specific agreement.

This case was heard in a somewhat anomalous way, as it was referred to take the testimony and report.

1119 The master has reported and this is therefore in the nature of a final hearing on the testimony. The learned master allowed himself to be persuaded to incorporate certain refusals of requests to find, a practice which has, as far as I can learn, no place in equity practice and the very beginnings of which I hope will always be resisted by the Federal Courts, which may otherwise find themselves in the unhappy predicament in that respect of the State Courts under the New York Code. I have wholly disregarded these findings  
1120 and refusals to find. I have treated the testimony as though submitted on final hearing.

This suit is in equity to recover the actual securities in specie; that is the prayer and that was what was intended. It is quite likely that the trustee may have had the right to sue at law after rescinding the transfer and making demand because the refusal would have been a conversion. However, he did nothing of the kind but proceeded in equity to reclaim the securities and he cannot now blow hot and cold. The decree will be for the delivery of the securities with any

dividends received upon them.<sup>1121</sup> If the complainant wishes, he may take a reference on an accounting as to the responsibility for the depreciation in value. I cannot decide such a matter upon affidavits, though from the letters it looks as though the parties had substantially agreed that the bank should exercise its good judgment as to the sale of the securities. If so, the bank would under no circumstances be responsible for depreciation. If the trustee did not so consent, the question would arise whether or not the bank was a trustee *ex maleficio* and if so whether it was responsible for any loss by depreciation regardless of whether it used due care. Those questions I will not consider until it appears whether the trustee did not assent to the bank's course.

The trustee will, of course, recover costs. Should a reference be had, I should be glad to have Judge BROWN again act as master, if he is willing.

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**Decree Entered January 15, 1912.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1126     HENRY D. HOTCHKISS, as trustee in  
 bankruptey of HENRY S. HASKINS,  
 HENRY LEVERICH, individually, and  
 FANNIE G. LATHROP, special part-  
 ner, and as co-partners trading  
 under the firm name of LATHROP,  
 HASKINS & COMPANY,  
 Complainant,

AGAINST

1127     NATIONAL CITY BANK,  
 Defendant.

The complainant above named, having heretofore, and on the 6th day of May, 1910, duly filed his bill of complaint against the above named defendant, and defendant having thereafter duly filed its answer thereto, and complainant having thereafter duly filed his replication to said answer, and the issues raised by said 1128 complaint, answer and replication having been by order of this Court, dated October 31, 1910, duly referred to the Hon. CHARLES F. BROWN, as Special Master, to take the testimony in this action and report the same to this Court, together with his opinion, and the said Special Master having, on October 18, 1911, duly made and filed his report herein, and complainant having, on October 26, 1911, duly excepted to that portion of said report wherein and whereby it was directed that defendant deliver to complainant the securities in suit and pay to the complainant the in-

terest and dividends by it collected thereon from the date of defendant's receipt thereof, and in default of such delivery that complainant have judgment against the defendant for the sum of \$161,740.62, with interest on \$154,300 from the date of said report, and on the interest and dividends collected as aforesaid from the date of the receipt thereof by defendant, and complainant having, on said October 26, 1911, duly served upon defendant a notice of motion to confirm said report of said Special Master, except as set forth in the exception thereto taken by complainant as aforesaid, and defendant having on November 17, 1911, duly filed its exceptions to said report of said Special Master, and said motion to confirm said report coming duly on to be heard, and on the hearing of said motion the affidavit of H. M. Kilborn, verified November 20, 1911, having been filed by defendant in opposition thereto, which affidavit embraced matters not submitted to said Special Master, and the complainant having duly objected and excepted to the filing of such affidavit by defendant on the ground that this action had theretofore been fully tried before the said Special Master and that he had theretofore duly rendered and filed his report therein, and complainant having filed his affidavit verified December , 1911, embodying said foregoing objections and answering said affidavit of H. M. Kilborn, and it appearing from the report of said Special Master, and I do find as matter of fact, that the firm of Lathrop, Haskins & Company, the above named bankrupts, on the 19th day of January, 1910, while insolvent and with intent to prefer, delivered to the defendant certain securities set forth in Schedule "A" annexed to the bill of complaint herein, and that at the time of the receipt of said securities and the taking possession thereof by defendant, the defendant had reasonable cause to believe that a preference was intended by said firm of Lathrop, Haskins & Company, and had reasonable cause to believe that said firm of Lathrop, Haskins and Company were insolvent.

Now on reading and filing all of the foregoing, and

1133 on motion of Abram I. Elkus and William S. McGuire, solicitors for complainant, it is

ORDERED, ADJUDGED AND DECREED that the transfer of the securities set forth in Schedule "A" annexed to the bill of complaint herein by said firm of Lathrop, Haskins & Company to the defendant on the 19th day of January, 1910, constituted a preference and was in violation of the Act of Congress approved July 1, 1898, entitled "An Act to establish a Uniform System of Bankruptcy throughout the United States, as amended",

1134 and that said transfer of said securities be, and the same hereby is, in all respects set aside and declared to be wholly void; and it is further

ORDERED, ADJUDGED AND DECREED that defendant verify and file with the Honorable CHARLES F. BROWN, who is hereby appointed Special Master for the purpose, an account of its disposition of such securities, which the complainant has leave to surcharge or falsify in accordance with the practice of this court; and it is

ORDERED, ADJUDGED AND DECREED, that the said 1135 Special Master take and state the account of the defendant upon the complainant's objections, if any, and report back the same for final decree, as provided by the course and practice of this court.

LEARNED HAND,  
*U. S. D. J.*

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**Defendant's Account.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee, etc.,	Account.	1138
AGAINST  NATIONAL CITY BANK.		

Pursuant to the order entered herein January 15, 1912, the defendant renders the following account of its disposition of the securities set forth in Schedule A, annexed to the Bill of Complaint herein, which it received from the firm of Lathrop, Haskins & Co., on January 19, 1910.

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The complainant and the defendant agreed that the defendant should, in the exercise of its judgment, determine whether the securities should be sold, or retained *in specie*, pending the determination of this suit, and the defendant accordingly, in the exercise of its judgment, has refrained from selling the said securities and has since had, and now has, them in its possession.

Annexed hereto and marked Exhibit A is an account of all the interest, dividends and income received by the defendant upon the said securities.

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The 200 shares of the common stock of the Columbus & Hocking Coal & Iron Company were, with the knowledge and consent of the complainant, deposited with the Refunding Committee, which undertook to reorganize the said Company, and an assessment of \$2000 was levied thereon. The defendant, with the knowledge and consent of the complainant herein, refused to pay this assessment, and on October 4, 1910, paid the sum of \$50, which it was obliged to do under

**1141** the agreement under which the said stock had been deposited, and received back the said stock.

Under the said order entered herein on January 15, 1912, the defendant is indebted to the plaintiff for the amounts set forth in Exhibit A, hereto annexed, with interest from the dates of the respective payments, less the sum of \$50, paid as aforesaid, with interest thereon from October 4, 1910; and it further holds the said securities for the account of the complainant, to be delivered pursuant to the decree of this Court.

**1142** THE NATIONAL CITY BANK OF NEW YORK,  
per

H. M. KILBORN,  
Vice-president.

---

STATE OF NEW YORK, }  
County of New York. }

**1143** HORACE M. KILBORN, being duly sworn, says that he is one of the Vice-Presidents of The National City Bank of New York, the defendant herein; and that the foregoing account is true and correct in all respects, to his knowledge.

HORACE M. KILBORN.

Sworn to before me, }  
January 23, 1912. }

FREDERIC N. GILBERT,

Notary Public,

New York County No. 196,

New York Register No. 3216.

**Exhibit A.**

Securities	Paid	Rate	Amt.	Total.
200 Sou. Pac.	Apr. 1-10	1½%	\$300.	
	Jly. 1-10	"	300.	
	Oct. 1-10	"	300.	
	Jan. 1-11	"	300.	
	Apr. 1-11	"	300.	
	Jly. 1-11	"	300.	
	Oct. 1-11	"	300.	1146
	Jan. 2-12	"	300.	
			—	
				\$2,400.
200 Reading com.				
(books closed Aug. 1-10	3%		300.	
Jan. 15, 1910) Feb. 1-11	"		300.	
Aug 1-11	"		300.	
			—	900.
100 N. Y.	Apr. 15-10	1½%	150.	1147
Cen. & Hud.	Jly. 15-10	"	150.	
	Oct. 15-10	"	150.	
	Jny. 15-11	"	150.	
	Apr. 15-11	1¼%	125.	
	Jly. 15-11	"	125.	
	Oct. 16-11	"	125.	
	Jny. 15-12	"	125.	
			—	
				1,100.
300 Rock Is. com.		No dividend.		1148
100 Cons.	Mch. 15-10	1%	100.	
Gas.	Jne. 15-10	"	100.	
	Sep. 15-10	"	100.	
	Dec. 15-10	1½	150.	
	Mch. 15-11	"	150.	
	Jne. 15-11	"	150.	
	Sep. 15-11	"	150.	
	Dec. 15-11	"	150.	
			—	
				1,050.

**1149** 100 Smltg. Apr. 15-10 1% 100.  
 & Ref. com. Jly. 15-10 " 100.  
 (books closed Oct. 15-10 " 100.  
 Dec. 26-1909) Jny. 15-11 " 100.  
 Jny. 19-11 " 3.12 (sale of rights)  
 Apr. 15-11 " 100.  
 Jly. 15-11 " 100.  
 Oct. 15-11 " 100.  
 Jny. 15-12 " 100.  
 \_\_\_\_\_ 803.12

**1150** 200 Hock. Co. No dividend.  
 & Iron com.

300 Mo. Kan.  
 & Tex. com. No dividend.

100 Wabash com. No dividend.

250 Ana- Apr. 19-10  $\frac{1}{2}\%$  125.  
 conda Jly. 20-10 " 125.  
**1151** (books closed Oct. 19-10 " 125.  
 January 7, Jny. 18-11 " 125.  
 1910) Apr. 18-11 " 125.  
 Jly. 18-11 " 125.  
 Oct. 18-11 " 125.  
 Jny. 17-12 " 125.  
 \_\_\_\_\_ 1,000.

100 Texas Pac. No dividend.

**1152** 100 Kan. Cty. So. com. No dividend.

100 Natl. Lead com.

Apr. 1-10  $1\frac{1}{4}\%$  125.  
 Jly. 1-10 " 125.  
 Oct. 1-10  $\frac{3}{4}\%$  75.  
 Jan. 1-11 " 75.  
 Apr. 1-11 " 75.  
 Jly. 1-11 " 75.  
 Oct. 1-11 " 75.  
 Jan. 3-12 " 75.  
 \_\_\_\_\_

700.

## Defendant's Account.

289

<b>200 U. S. Steel Com.</b>		<b>1153</b>
Mch. 30-10 1 $\frac{3}{4}$ %	87.50	
Jne. 29-10 1 $\frac{1}{4}$ %	62.50	
Sept. 29-10 1 $\frac{1}{4}$ %	62.50	
Dec. 30-10 1 $\frac{1}{4}$ %	62.50	
Mch. 30-11 1 $\frac{1}{4}$ %	62.50	
Jne. 30-11 1 $\frac{1}{4}$ %	62.50	
Sep. 30-11 1 $\frac{1}{4}$ %	62.50	
Jan. 2-12 1 $\frac{1}{4}$ %	62.50	
	—	525.
		<b>1154</b>
<b>10 Union</b>	<b>Jly. 1-10 2%</b>	<b>200.00</b>
Pac. conv. 4s	Jny. 1-11 "	200.00
	Jly. 1-11 "	200.00
	Jny. 1-12 "	200.00
	—	800.
<b>Total</b>	<b>-----</b>	<b>\$9,278.12</b>

**1155****1156**

1157

**Complainant's Charge to Defendant's Account.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1158

HENRY D. HOTCHKISS, as Trustee,  
etc.,

Plaintiff,

AGAINST

NATIONAL CITY BANK,  
Defendant.

Complainant's  
Charge to De-  
fendant's Ac-  
count.

1159 The complainant renders his charge to the account heretofore filed herein by the defendant on January 23rd, 1912, as follows:

FIRST: Complainant on the 18th day of February, 1910, duly made a written demand upon defendant for the return of the securities set forth in Schedule "A" annexed to the Bill of Complaint herein, with which demand defendant has wholly failed to comply.

SECOND: Complainant has never in any manner or form, either orally or in writing, consented or agreed 1160 to abide or be bound by defendant's decision as to whether the said securities should be sold by it or retained *in specie*, pending the determination of this action. The only stipulation entered into by complainant in regard to the said securities is that dated April 5th, 1910, which stipulation was duly ratified and approved by this Court on April 23th, 1910.

THIRD: Complainant alleges on information and belief that defendant has not acted under the said stipulation to sell any of the said securities. Annexed hereto and marked Schedule "A" is an account of

the value of the said securities at the time of delivery 1161 to defendant on January 19th, 1910.

FOURTH: Defendant is indebted to complainant in the sum of One Hundred Fifty-four Thousand, Three Hundred (\$154,300) Dollars, the sum total of said Schedule "A," together with interest thereon from January 19th, 1910.

ABRAM I. ELKUS and WILLIAM S. MCGUIRE,  
Attorneys for Plaintiff,  
Office and Post Office Address,  
No. 170 Broadway, 1162  
Borough of Manhattan,  
New York City.

### **Schedule "A."**

List of securities delivered to the National City Bank, defendant herein, on January 19th, 1910, with their value as of that date:

200 shares	Southern Pacific-----	129	\$25,800	
200 shares	Reading Common-----	79½	15,900	1163
100 shares	New York Central-----	117	11,700	
300 shares	Chicago Rock Island & Pacific Common..	41	12,300	
100 shares	Consolidated Gas-----	146	14,600	
100 shares	American Smelting & Refining Company--	92	9,200	
200 shares	Hocking Coal & Iron Common-----	32	6,400	
300 shares	Missouri, Kansas & Texas Common-----	44	13,200	1164
100 shares	Wabash Common-----	21	2,100	
250 shares	Anaconda Copper -----	50	12,500	
100 shares	Texas Pacific-----	32	3,200	
100 shares	Kansas City Southern Common-----	39	3,900	
100 shares	National Lead Common	84	8,400	
50 shares	U. S. Steel Common---	82	4,100	
10	Union Pacific Convertible 4% Bonds-----	1100	11,000	
	Total-----		\$154,300	

1165

**Stenographer's Minutes on Reference on Accounting.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK,

1166

HENRY D. HOTCHKISS, as Trustee, etc.,

AGAINST

THE NATIONAL CITY BANK,

REFERENCE ON ACCOUNTING BEFORE HON. CHARLES F. BROWN, SPECIAL MASTER.

NEW YORK, 26 February 1912.

1167 Appearances :

MESSRS. JAMES, SCHELL & ELKUS (MR. ELKUS) for Henry D. Hotchkiss;

MESSRS. SHEARMAN & STERLING (MR. GARVER) for the National City Bank.

MR. ELKUS : I will offer in evidence a letter dated January 20th, 1910, written by Henry D. Hotchkiss to the National City Bank.

It is marked Plaintiff's Exhibit No. 1 of this date  
1168 and is as follows :

" NEW YORK, January 20, 1910.

NATIONAL CITY BANK,  
55 Wall Street,  
New York City.

DEAR SIR :—

You are hereby notified that I have been appointed receiver of the firm of Lathrop, Haskins & Co., and have duly qualified as such, and you are notified not

to sell or otherwise dispose of any of the collateral **1169** you now hold on account of your loan to Lathrop, Haskins & Co.

Yours respectfully,

HENRY D. HOTCHKISS,

Receiver in Bankruptcy."

MR. ELKUS: I will offer in evidence letter dated February 18th, 1910, written by Henry D. Hotchkiss to Shearman & Sterling.

MR. GARVER: This letter is objected to as incompetent, irrelevant and immaterial, and referring to a matter which the Master has not the power to pass upon.

Objection overruled.

Exception.

The letter is marked Plaintiff's Exhibit No. 2 of this date, and is as follows :

"LATHROP, HASKINS & CO.

**1171**

Bankers & Brokers

60 Broadway

NEW YORK, February 18, 1910.

MESSRS. SHERMAN & STERLING,

City Bank Building,

New York City.

DEAR SIRS:

**1172**

I hold the receipt of the National City Bank for the securities as per list appended hereto, which securities, I am advised, were delivered to the bank by Messrs. Lathrop, Haskins & Co. sometime after the announcement of their suspension on the 19th ultimo. As this delivery seems to have been clearly in violation of the bankruptcy law, I beg to notify you that as Receiver of said firm, I claim said securities, and request that they be immediately delivered to me.

Will you be good enough to advise me whether this

1173 demand, made upon you, will be accepted by the bank as technically sufficient, or whether demand must be made upon the bank itself?

Awaiting your early reply, I am,

Yours respectfully,  
H. D. HOTCHKISS,  
Receiver.

Dictated

H. D. H.

A. K. D. M.

1174

List of Securities delivered to City Bank, January 19th.

200 Southern Pacific

200 Reading

100 N. Y. Central

300 Rock Island Common

100 Consolidated Gas

100 Smelters

200 Hocking Coal & Iron

1175

300 Missouri, Kansas & Texas

100 Wabash Common

250 Anaconda

100 Texas Pacific

100 Kansas City Southern

100 National Lead Common

50 U. S. Steel Common

10M Union Pacific Conv. 4s "

MR. ELKUS : I offer in evidence the reply to Exhibit 1176 2 received from Shearman & Sterling, dated February 18th, 1910.

Same objection, ruling and exception.

The letter is marked Plaintiff's Exhibit 3 of this date, and is as follows :

" FEBRUARY 18, 1910. 1177

HENRY D. HOTCHKISS, Esq.,  
Receiver, Lathrop, Haskins & Co.,  
60 Broadway.

DEAR SIR :

We are in receipt of your letter of this date. You can consider the letter to have the same force and effect as if it had been addressed directly to the National City Bank.

Yours very truly, 1178  
SHEARMAN & STERLING."

MR. ELKUS : That is all, except a proof of the value of the securities at the time of the trial, and at the present time which I think we can agree about in a stipulation.

MR. ELKUS : I offer in evidence the market values of the securities described in the Bill of Complaint as taken by the defendant on the 19th day of January, 1910, from Lathrop, Haskins & Company ; also the proof of the values of the securities on April 5th, 1910, April 25th, 1910, and February 26th, 1912. 1179

Objected to as irrelevant, incompetent and immaterial, and as not coming within the issues.

Objection overruled.

Defendant excepts.

The same are marked Plaintiff's Exhibit 4 of this date, and are as follows :

1180

**1181**January 19th 1910  
at 2:15 P. M.

April 5th 1910.

	Securities.	Quota-	Quota-
		tion	tion
200	Sou. Pacific. ....	129	\$25,800.
200	Reading Com. ....	159	15,900.
100	N. Y. Central. ....	117	11,700.
300	Rock Island. ....	41	12,300.
100	Cons. Gas Co. ....	146	14,600.
100	Amer. Smelting. ....	92	9,200.
200	Hocking Coal & I.	32	6,400.
300	Mo. Kan. & Texas	44	13,200.
<b>1182</b>	100 Wabash. ....	21	2,100.
250	Anaconda. ....	50	12,500.
100	Texas & Pac. ....	32	3,200.
100	Kan. City Sou. ....	39	3,900.
100	Natl. Lead. ....	84	8,400.
50	U. S. Steel. ....	82	4,100.
10	Union Pac. Con.		
	4% .....	110	11,000.
	& int.		
	Total. ....		\$154,300.

April 25th 1910

February 26th 1912

**1183**

	Securities	Quota-	Quota-
		tion	tion
200	Sou. Pacific. ....	123½	\$24,700.
200	Reading Com. ....	160	16,000.
100	N. Y. Central. ....	120½	12,050.
300	Rock Island. ....	44½	13,350.
100	Cons. Gas Co. ....	137½	13,750.
100	Amer. Smelting. ....	79½	7,937.50
200	Hocking Coal & I.	13 asked	2,600.
300	Mo. Kan. & Texas	41	12,300. (bid 26½)
100	Wabash. ....	20	2,000. (bid 6½)
250	Anaconda. ....	43½	10,937.50
<b>1184</b>	100 Texas & Pac. ....	31 bid	3,100. (bid 21½)
		32 asked	
100	Kan. City Sou. ....	35	3,500.
100	Natl. Lead. ....	79½	7,962.50
50	U. S. Steel. ....	81½	4,081.25
10	Union Pac. Con.		
	4% .....	106½	10,650. (bid 101½)
	& int.		
	Total. ....		\$144,918.75

MR. GARVER : I offer in evidence stipulation entered into between the parties hereto dated April 5th, 1910.

It is marked Defendant's Exhibit A of this 1185 date.

MR. GARVER: I offer in evidence the order entered upon this stipulation dated April 25th, 1910, and filed on that day in the United States District Court.

It is marked Defendant's Exhibit B of this date.

Defendant's Exhibits A and B of this date are as follows (omitting the schedule of securities, which is the same as Exhibit "A" annexed to 1186 the Bill of Complaint):

**Defendant's Exhibit A.**

"UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

1187

OF

HENRY STANLEY HASKINS, HENRY S.  
LEVERICH and FANNIE G. LATHROP,  
individually and as members of the  
firm of LATHROP, HASKINS & COM-  
PANY,

Bankrupts.

1188

WHEREAS, certain securities appearing in the annexed schedule marked Exhibit A were delivered to the National City Bank on the 19th day of January, 1910, and are held by the said Bank and claimed as their property; and

WHEREAS, Henry D. Hotchkiss, as receiver of Lathrop, Haskins & Company, claims that the alleged transfer of the said securities appearing in Exhibit A to the National City Bank is void and that the title to

1197        MR. GARVER : I offer in evidence letter from the complainant to the defendant dated March 8th, 1910.

MR. ELKUS : I object because it is merged in the stipulation that you have put in evidence.

Objection overruled.

Exception.

It is marked Defendant's Exhibit C of this date, and is as follows :

1198        " LATHROP, HASKINS & Co.

60 Broadway.

Henry D. Hotchkiss,  
Receiver,  
165 Broadway.

NEW YORK, MARCH 8, 1910.

H. M. KILBORN, Esq., Vice-President,  
The National City Bank,  
1199        55 Wall Street, New York City.

DEAR SIR :

I think your suggestion to Mr. Barnaby, that you be permitted to use your own good judgment as to when you shall liquidate the securities held by you for account of collateral loans to Messrs. Lathrop, Haskins & Co., is a very good one, and I thank you for making it.

With respect to the securities delivered to you upon 1200 the 19th of January, and which were the subject of a recent demand on my part, I think it might also be well to get the benefit of the most advantageous market. But this perhaps, ought to be covered by a stipulation approved by your attorneys. I would suggest reference of the matter to them, to the end that we may arrange a course for the best interest of all concerned.

I would think that perhaps an exception might be made with respect to any Columbus & Hocking securi-

ties which you hold on account of either collateral loans or otherwise. I am impressed with the idea that it would be inexpedient to take the present prices for these securities, and that it might be better to hold them. I do not pretend to assert any control over what you shall do with respect to any Hocking securities held under your collateral notes, I merely make the suggestion for your consideration.

Very truly yours,

H. D. HOTCHKISS,

Receiver." 1202

MR. GARVER: I offer in evidence letter written to the plaintiff by the defendant dated March 9th, 1910.

Same objection, ruling and exception.

It is marked Defendant's Exhibit D of this date, and is as follows:

" MARCH 9TH, 1910.

HENRY D. HOTCHKISS, Esq.,

1202

Receiver, Lathrop, Haskins & Co.,  
164 Broadway, New York.

DEAR SIR :

We are in receipt of your letter of the 8th instant.

Acting on our understanding, we will sell the securities held for account of the collateral loans at such times as may in our judgment be advisable.

With respect to the securities delivered to us on the 19th of January, we suggest that you prepare a form of stipulation that will be satisfactory to you, which we will submit to our Counsel for their approval. It is our desire to act in accordance with the best interests of all concerned.

1204

Yours very truly,

H. M. KILBORN,

Vice-President."

MR. GARVER: I offer in evidence letter written by Mr. Elkus to Mr. Garver dated March 30th,

**1205** 1910, with reference to the stipulation, Defendant's Exhibit A of this date.

Same objection, ruling and exception.

It is marked Defendant's Exhibit E of this date and is as follows :

" NEW YORK, March 30, 1910.

*In re Lathrop, Haskins & Co.*

**JOHN A. GARVER, Esq.,**  
**1206 55 Wall Street,**  
**New York City.**

**DEAR MR. GARVER :**

In accordance with our conversation, I herewith send you form of stipulation. If agreeable to you kindly have it signed by your clients and I will have Mr. Hotchkiss sign it and have same approved by the Court.

Very truly yours,

ABRAM I. ELKUS."

**1207**

**MR. GARVER:** I offer in evidence letter written by Mr. Garver to Mr. Elkus in reply to his letter dated April 5th, 1910.

Same objection, ruling and exception.

It is marked Defendant's Exhibit F of this date, and is as follows :

" APRIL 5, 1910.

**ABRAM I. ELKUS, Esq.,**  
**1208 170 Broadway.**

**DEAR MR. ELKUS :**

There has been some delay in having the stipulation signed, but no harm has been done, as none of the securities have been sold. I now enclose the stipulation, which I have signed in duplicate. Please let me know as soon as it has been approved by the Court.

Yours very truly,

JOHN A. GARVER.

Enclosure."

MR. ELKUS : I offer in evidence letter dated 1209 April 19th, 1910, from James, Schell & Elkus to Messrs. Shearman & Sterling.

MR. GARVER : I object as irrelevant, incompetent and immaterial, and not within the issues referred by the Court, and as being written subsequent to the date of the said stipulation.

The letter is marked Plaintiff's Exhibit 5 of this date, and is as follows :

" NEW YORK, April 19, 1910. 1210  
*Hotchkiss, Trustee, Lathrop, Haskins & Co.  
vs. National City Bank.*

MESSRS. SHEARMAN & STERLING,  
55 Wall Street,  
New York City.

DEAR SIRS :—

Mr. Henry D. Hotchkiss has been duly elected trustee of Lathrop, Haskins & Co., and has qualified 1211 as such.

Mr. Hotchkiss, as receiver, made demand upon you for certain securities which he claimed you had received from Lathrop, Haskins & Co. without any right to hold the same as against him as receiver. You failed to comply with this demand. Before instituting suit I make this formal demand upon you for the return of the securities in question. Will you consider this as a formal demand made by the trustee upon your clients, the National City Bank? I shall be 1212 glad to hear from you with reference to this at your early convenience.

We assume you will accept service for your clients.

Very truly yours,

ABRAM I. ELKUS."

TESTIMONY CLOSED.

1213

## **Report of Special Master on Accounting.**

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

**HENRY D. HOTCHKISS, as Trustee in  
Bankruptcy of Henry S. Haskins  
and others, as copartners trading  
under the firm name of Lathrop,  
Haskins & Company,**  
*Complainant.*

AGAINST

**NATIONAL CITY BANK,**  
**Defendant.**

2115

**TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:**

I, the undersigned, having by an order of this Court been appointed Special Master to take and state the account of the defendant upon the complainant's objections (if any) and report back the same for a final decree, do respectfully report:

That pursuant to the order of the Court the defendant filed with me an account duly verified of its disposition of the securities set forth in Schedule A annexed to the bill of complaint, which is hereto annexed. That the complainant filed such objections in writing to said account which objections are also hereto annexed. That on the 26th day of February, 1912, at my office, No. 60 Wall Street in the City of New York, the parties attended before me by their respective counsel. That testimony was taken by me consisting of certain letters and stipulations of the parties, all of which are hereto annexed.

That I have heard the argument of counsel and have

duly considered the same, and upon the testimony I 1217 report as follows :

In the complainant's charge to the defendant's account in the fourth specification it is claimed that the defendant is indebted to "the complainant in the sum of one hundred and fifty-four thousand three hundred (\$154,300) dollars, the sum total of said Schedule A, together with interest thereon from January 19th, 1910."

It is my understanding that this claim has already been overruled by this Court. In the order by which 1218 it was referred to me to take and state the account of the defendant it is adjudged that the transfer of the securities to the defendant by the firm of Lathrop, Haskins & Company should in all respects be set aside and declared wholly void ; and in the opinion of Judge HAND by whom such order was made, a copy of which has been given to me by counsel, it is said :

" This suit is in equity to recover the actual securities *in specie*; that is the prayer and 1219 that was what was intended. It is quite likely that the Trustee may have had the right to sue at law after rescinding the transfer and making a demand, because a refusal would have been a conversion. However, he did nothing of the kind but proceeded in equity to recover the securities and he cannot now blow hot and cold. The decree will be for the delivery of the securities with any dividends received upon them."

1220

I have accordingly stated the account of the defendant upon that basis. Annexed hereto is a list of the securities transferred to the defendant showing the dividends received thereon and the date of the receipt thereof. In a separate column I have stated the interest upon the sums received by the defendant from the date of the receipt of each dividend to the date of this report.

Upon the hearing before me it was claimed by the learned counsel for the complainant that the defendant

1221 was also liable for the depreciation in the value of said securities.

The parties have stipulated the value of the securities on January 19th, 1910, the date of the transfer to the defendant; on April 5th, 1910, the date of the stipulation as to the sale of said securities by the defendant; on April 25th, 1910, the date that such stipulation was approved by the Court; and on February 26th, 1912, the date of the hearing before me.

In my opinion the defendant is not liable for the 1222 depreciation in the value of the securities shown to exist by this testimony.

The letters which passed between the parties and their respective counsel, with the exception of the letter dated April 19th, 1910, written by the counsel for the complainant to the counsel for the defendant, all led up to the making of the stipulation which bears date April 5th, 1910.

By this stipulation it was provided that the securities

1223

"may be sold by the National City Bank at the best price obtainable, at such time as may seem best to the officers of the said National City Bank."

And it was further provided that:

1224

"the amount realized from the sale of the said securities shall stand in lieu of the said securities and shall represent the amount of the liability of the said National City Bank to the receiver and trustee in bankruptcy of Lathrop, Haskins & Company should it be adjudicated that the delivery of the said certificates to the National City Bank was preferential and void as against the rights of creditors."

At the date of the stipulation the securities had depreciated nearly \$5,000, and on April 25th, when the stipulation was approved by the Court, nearly \$10,000

from their value on the 19th of January, 1910, when 1225  
the transfer was made.

The amount for which the securities might have been sold by the defendant might be more than the market value of the securities at the date of the stipulation or it might be less. But whether more or less the amount received upon such sale was by the stipulation of the parties to be the measure of the defendant's liability.

There is no testimony before me nor has any claim been made that in not selling the securities the defendant acted other than in good faith and in the exercise of its best judgment, nor is there any claim that the deficiency or any part of it was caused by the defendant. 1226

The prayer for judgment contained in the bill of complaint is to recover the actual securities, and it is my opinion that the intent of the parties as expressed in the stipulation was to authorize the defendant during the pendency of the litigation, in case it deemed best so to do, to sell the securities, and in case a sale 1227 was made, to substitute as the subject matter of the litigation the proceeds of the sale in lieu of the actual securities.

In my opinion the objections of the complainant to defendant's account should be overruled and the account confirmed.

All of which is respectfully submitted.

Dated, New York, March 5, 1912.

1229

## ACCOUNT AS STATED BY THE SPECIAL MASTER.

	Securities	Paid	Rate	Amt.	Total	Interest to Mar. 5, 1912.
1229	200 Sou. Pac. Apr.	1-10	1½%	\$300.		
	Jly.	1-10	"	300.		
	Oct.	1-10	"	300.		
	Jan.	1-11	"	300.		
1230	Apr.	1-11	"	300.		
	Jly.	1-11	"	300.		
	Oct.	1-11	"	300.		
	Jan.	2-12	"	300.		
					— \$2,400	\$152.00
200 Reading com. (books Aug. closed Jan. Feb. 15, 1910)	Aug.	1-10	3%	300.		
	Jan.	1-11	"	300.		
	Feb.	1-11	"	300.		
	15, 1910)	Aug.	1-11	"	300.	
1231					— \$900	58.55
	100 N. Y. Cent. Apr.	15-10	1½%	150.		
	& Hud. Jly.	15-10	"	150.		
	Oct.	15-10	"	150.		
	Jan.	15-11	"	150.		
	Apr.	15-11	1½%	125.		
	Jly.	15-11	"	125.		
	Oct.	16-11	"	125.		
	Jan.	15-12	"	125.		
					— 1,100.	69.16
1232	300 Rock Is.					
	com.	No dividend.				
1233	100 Con. Gas. Meh.	15-10	1%	100.		
	Jne.	15-10	"	100.		
	Sep.	15-10	"	100.		
	Dec.	15-10	1½%	150.		
	Mch.	15-11	"	150.		
	Jne.	15-11	"	150.		
	Sep.	15-11	"	150.		
	Dec.	15-11	"	150.		
					— 1,050.	63.15

100 Smelting	Apr. 15-10	$1\frac{1}{2}\%$	100.		1233
& Ref. com.	Jly. 15-10	"	100.		
(books	Oct. 15-10	"	100.		
closed	Dec. Jan. 15-11	"	100.		
26, 1909)	Jan. 19-11		3.12 (sale of rights)		
	Apr. 15-11	"	100.		
	Jly. 15-11	"	100.		
	Oct. 15-11	"	100.		
	Jan. 15-12	"	100.		
			—	803.12	48.78
200 Hock. Co.					1234
& Iron					
com.	No dividend.				
300 Mo. Kan.					
& Tex. com.	No dividend.				
100 Wabash					
com.	No dividend.				
250 Anaconda	Apr. 19-10	$\frac{1}{2}\%$	125.		
(books closed	Jly. 20-10	"	125.		
January 7,	Oct. 19-10	"	125.		
1910)	Jan. 18-11	"	125.		1235
	Apr. 18-11	"	125.		
	Jly. 18-11	"	125.		
	Oct. 18-11	"	125.		
	Jan. 17-12	"	125.		
			—	1,000.	59.24
100 Texas					
Pac.	No dividend.				
100 Kan. City					
So. com.	No dividend.				
100 Nat'l	Apr. 1-10	$1\frac{1}{2}\%$	125.		1236
Lead com.	Jly. 1-10	"	125.		
	Oct. 1-10	$3\frac{1}{2}\%$	75.		
	Jan. 1-11	"	75.		
	Apr. 1-11	"	75.		
	Jly. 1-11	"	75.		
	Oct. 1-11	"	75.		
	Jan. 3-12	"	75.		
			—	700.	47.29

1239

1240

1241

**Notice of Motion to Disallow Report of  
Special Master on Accounting.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee in  
Bankruptcy of Henry S. Haskins,  
HENRY LEVERICH and FANNIE G.  
LATHROP, copartners under the  
firm name and style of Lathrop,  
Haskins & Company,  
Complainant,

1242

AGAINST

NATIONAL CITY BANK,  
Defendant.

1243

SIRS: Please take notice that upon the report of the Hon. CHARLES F. BROWN, Special Master in the above entitled action, which was duly filed in the office of the clerk of the United States District Court for the Southern District of New York on the 6th day of March, 1912, and the exceptions thereto taken by the complainant and duly filed with said Special Master, a copy of which exceptions were on the 11th day of March, 1912, duly served upon you, and upon the 1244 stipulation entered into by the parties of this action, dated February 26, 1912, filed with the said Special Master on that date and made a part of the record herein setting forth the market value of the securities in suit on January 19, 1910, at the time of their delivery to defendant on April 5, 1910, April 25, 1910, and February 26, 1912, respectively, the undersigned will move this Court at a stated term thereof to be held at the Post Office Building in the Borough of Manhattan, City of New York, on the 22nd day of

1245 March, 1912, at eleven o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order disallowing the said report of the said Special Master, dated March 6th, 1912, and for a decree directing that the complainant have judgment against the defendant for the return *in specie* of the securities set forth in Schedule A annexed to the Bill of Complaint herein, together with all interest and dividends received thereon by the defendant, with interest on each item of interest or dividends from the date of its receipt by defendant to the date of final judgment herein, together with the difference between \$154,300, the conceded value of the said securities on the date of their taking by defendant, and their market value at the date of entry of final judgment herein; or, in the alternative, for a judgment against the defendant for the sum of \$154,300, with interest thereon from January 19, 1910, to the date of the final judgment herein; and for such other and further relief as to the Court may seem just and equitable.

1246 Dated New York, March 15th, 1912.

Yours, etc.,

ABRAM I. ELKUS & WILLIAM S. MCGUIRE,  
Solicitors for Complainant,  
Office and Post Office Address,  
No. 170 Broadway,  
Borough of Manhattan,  
New York City.

TO MESSRS. SHEARMAN & STERLING,  
Solicitors for Defendant, No. 55 Wall  
Street, Borough of Manhattan, New  
York City.

**Complainant's Exceptions to Report on  
Accounting.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee in Bankruptcy of Henry S. Haskins and others, trading under the firm name of Lathrop, Haskins & Company, Complainant,	Complainant's Exceptions.	1250
AGAINST  NATIONAL CITY BANK, Defendant.		1251

And now comes Henry D. Hotchkiss, the complainant herein, and excepts to the report of the Hon. CHARLES F. BROWN, the Special Master, filed in this cause on March 6th, 1912, and for cause of exception shows:—

FIRST:—That the Master has, in said report, stated and certified that defendant is not liable for the depreciation in the value of the securities in suit shown to have taken place since January 19th, 1910, the date of the delivery to defendant of said securities; whereas it appears from the evidence that on February 19th, 1910, and before the commencement of this action, complainant duly demanded in writing that defendant return said securities to him, with which demand defendant has ever since refused to comply, and defendant still retains said securities; and by reason of such retention thereof by defendant, complainant has been deprived of the opportunity to dispose of said securities at advantageous prices; and it does not appear that complainant has ever, in any manner or form

1253 whatsoever, waived his claim to the immediate possession of said securities. By its act in taking said securities, its retention thereof and refusal to deliver them to the complainant, defendant became and continued to be a trustee *ex maleficio* as to said securities, and as such, was and is liable for any depreciation in their value since said taking and the Master should have so found.

SECOND :—That the Master has, in said report, stated and certified that the effect of the stipulation entered 1254 into by the parties herein, dated April 5th, 1910, was to release defendant from any right on the part of complainant to hold defendant liable for the depreciation in value of said securities ; whereas, it appears from the whole of said stipulation that the parties intended that only a *sale* of said securities by defendant pursuant to the terms thereof should operate as a waiver of any of complainant's rights, and it was further intended (as expressly stated in said stipulation) that the mere act of making the stipulation should not 1255 alter in any way the rights or claims of any of the parties. It is conceded that the defendant never acted in any way pursuant to this stipulation, and the stipulation, therefore, never went into effect or became operative, and the respective rights of complainant and defendant are the same in all respects as if the stipulation had not been made, and the Master should have so found.

THIRD :—That the Master has, in said report, stated and certified that defendant's account as filed with him 1256 should be confirmed and has overruled the objections thereto filed by complainant ; whereas he should have allowed said objections as filed by complainant, and should have found that complainant is entitled to recover from defendant the securities *in specie* set forth in Schedule A annexed to the Bill of Complaint herein, together with all interest and dividends received thereon by defendant, with interest upon every such item of interest and dividends from the date of its receipt by defendant to the entry of final judgment herein, and an additional sum equal to the difference

between the conceded market value of said securities 1257 at the time they were taken by defendant, and their market value at the date of final judgment herein; or, in the alternative, that complainant is entitled to recover from defendant the market value of said securities on January 19, 1910, together with interest thereon from January 19, 1910, to the entry of final judgment herein.

ABRAM I. ELKUS and WILLIAM S. MCGUIRE,  
Solicitors for Complainant,  
Office & Post Office Address, 1258  
170 Broadway,  
Borough of Manhattan,  
City of New York.

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**Opinion of Hand, J., Confirming Special  
Master's Report on Accounting.**

1259

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

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HENRY D. HOTCHKISS, as Trustee, etc., }  
AGAINST }  
THE NATIONAL CITY BANK OF NEW }  
YORK. } 1260

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HAND, District Judge:

The sole question is whether or not the trustee consented that the bank might hold or sell the securities in its good judgment for the account of whom it might concern. If so, of course the trustee cannot charge the bank, for its judgment he had accepted as his own. Therefore, it is impossible to argue that the bank had

1261 never "acted" under the stipulation. There was to be no action unless the bank thought fit to sell, which it never did; if the holding as well as the selling was within the consent of the parties the trustee may not now charge that holding as wrongful after the date of the stipulation, April 5, 1910.

The stipulation provides first that the securities "may be sold by the National City Bank at the best price obtainable, at such time as may seem best to the officers of the said" bank. I do not see how it could 1262 be put more plainly that the bank should have leave to keep the securities unsold until in its judgment the best prices could be obtained. It was natural for the trustee to prefer the bank's judgment to his own. If the stipulation did not mean that, then it accomplished nothing but to limit the bank's liability to the amount realized on a sale, if it determined at any time to sell. To hold under such circumstances exposed it to the risk of loss, while to sell did not; therefore to construe the stipulation in that way would be to produce 1263 the greatest incentive to an immediate sale. The purpose of the stipulation was certainly not that, but to get the advantage of the bank's best judgment as to the time to sell.

Therefore, in no event can the trustee recover for any depreciation after April fifth, when the trustee consented. The only other question is the depreciation of five thousand dollars between January nineteenth, 1910, and April fifth, 1910. On March eighth, 1910, the trustee wrote: "I think your suggestion to 1264 Mr. Barnaby that you be permitted to use your own good judgment as to when you shall liquidate" the collaterals "is a very good one, and I thank you for making it." Regarding the securities here in question, "I think it might also be well to get the benefit of the most advantageous market. But this, perhaps, ought to be covered by a stipulation approved by your attorneys."

After writing such a letter, the trustee may not charge the bank with loss for failure to sell pending the preparation of such a stipulation. Clearly he had

put the matter then in train for settlement *quoad* the 1265  
time of the sale. Between January nineteenth, 1910,  
and March eighth, 1910, it does not appear how much,  
if at all, the securities had fallen in value and there is  
then no occasion to consider whether for loss in that  
period the bank's account might have been surcharged.

This stipulation furthermore gives one more reason  
why the claim should not now be construed to sound  
in conversion. It shows that at that time the trustee  
was claiming that the transfer was void and that the  
title of the securities remained his, and indeed the 1266  
whole purpose of the stipulation presupposes that he  
still has an interest in them, when they should be sold,  
and how much should be obtained for them. Such an  
assertion, and such a solicitude were wholly inconsis-  
tent with a claim of conversion, which proceeds in  
recognition of the defendant's claim of dominion over  
the property as finally depriving the plaintiff of his  
title and justifying his recovery of its full value. It is  
not to be supposed that the suit when brought was  
based upon a contrary and inconsistent theory to that 1267  
originally conceived, at least in the absence of some  
evidence, even though the stipulation did not constitute  
a final election between the remedies open to the  
plaintiff, as perhaps it did not.

The master's report is confirmed and final decree  
may pass for the amount as stated in the account.

1269

**Final Decree entered April 11, 1912.**

At a Stated Term of the United States District Court for the Southern District of New York, held in the Post Office Building in the Borough of Manhattan, City of New York, on the 8 day of April, 1912.

1270 Present: HON. LEARNED HAND, District Judge.

HENRY D. HOTCHKISS, as Trustee in Bankruptcy of Henry S. Haskins, Henry Leverich, individually, and Fannie G. Lathrop, special partner, and as co-partners trading under the firm name of Lathrop, Haskins & Company,

Complainant,

AGAINST

NATIONAL CITY BANK,  
Defendant.

The complainant above named, having heretofore, and on the 6th day of May, 1910, duly filed his bill of complaint against the above named defendant, and defendant having thereafter duly filed its answer thereto, and complainant having thereafter duly filed his replication to said answer, and the issues raised by said complaint, answer and replication having been, by order of this Court, dated October 31, 1910, duly referred to the Hon. CHARLES F. BROWN, as Special Master, to take the testimony in this action and report the same to this Court, together with his opinion, and the said Special Master having, on October 18, 1911, duly made and filed his report herein, and complainant having, on October 26, 1911, duly excepted to that por-

tion of said report wherein and whereby it was directed 1273 that defendant deliver to complainant the securities in suit and pay to the complainant the interest and dividends by it collected thereon from the date of defendant's receipt thereof, and in default of such delivery that complainant have judgment against the defendant for the sum of \$161,740.62, with interest on \$154,300 from the date of said report, and on the interest and dividends collected as aforesaid from the date of the receipt thereof by defendant, and complainant having, on said October 26, 1911, duly served upon defendant 1274 a notice of motion to confirm said report of said Special Master, except as set forth in the exception thereto taken by complainant as aforesaid, and defendant having, on November 17, 1911, duly filed its exceptions to said report of said Special Master, and said motion to confirm said report coming duly on to be heard, and on the hearing of said motion the affidavit of H. M. Kilborn, verified November 20, 1911, having been filed by defendant in opposition thereto, which affidavit embraced matters not submitted to said 1275 Special Master, and the complainant having duly objected and excepted to the filing of such affidavit by defendant on the ground that this action had theretofore been fully tried before the said Special Master, and that he had theretofore duly rendered and filed his report therein, and complainant having filed his affidavit verified December , 1911, embodying said foregoing objections and answering said affidavit of H. M. Kilborn, and this Court having thereafter, on January 15, 1912, duly made a decree 1276 herein confirming said report of said Special Master by the terms of which decree this Court found as a matter of fact that the firm of Lathrop, Haskins & Company, the above named bankrupts, on the 19th day of January, 1910, while insolvent and with intent to prefer, delivered to defendant certain securities set forth in Schedule "A" annexed to the bill of complaint herein, and that at the time of the receipt of said securities and the taking possession thereof by defendant, the defendant had reasonable cause to believe that

1277 a preference was intended by said firm of Lathrop, Haskins & Company, and had reasonable cause to believe that said firm of Lathrop, Haskins & Company was insolvent ; and said decree having further determined that said transfer of said securities on said January 19, 1910, constituted a preference, and having set aside said transfer in all respects and declared the same to be wholly void ; and said decree having directed defendant to verify and file with the Hon. CHARLES F. BROWN, as Special Master, an account of 1278 its disposition of said securities, with leave to complainant to surcharge or falsify said account, and having directed said Special Master to take and state said account of defendant upon complainant's objections (if any) and report back the same to this Court for final decree ; and defendant having on January 23, 1912, duly filed its said account with said Special Master, and complainant having, on February 21, 1912, duly filed his charge to defendant's account with said Special Master, containing objections thereto, and said 1279 Special Master having, on March 6, 1912, duly made and filed his report confirming defendant's said account and overruling complainant's objections thereto ; and complainant having, on March 11, 1912, duly made and filed with said Special Master his exceptions to said report, and having thereafter duly moved to disaffirm said report, and said motion coming duly on to be heard, and due deliberation having been had,

Now, on reading and filing all of the foregoing, it is

1280 ORDERED, ADJUDGED AND DECREED that said report of said Special Master be and the same hereby is in all respects confirmed ; and it is further

ORDERED, ADJUDGED AND DECREED that defendant deliver to complainant within five days after service of a copy hereof on defendant's attorneys, the securities set forth in Schedule "A" annexed to the bill of complaint herein, together with all interest and dividends thereon received by defendant from the time defendant received said securities to the date of such delivery ; and it is further

ORDERED, ADJUDGED AND DECREED that in default of 1281 such delivery complainant have judgment against the defendant for the sum of \$161,740.62 with interest thereon from October 17, 1911, to the date hereof, and that complainant have execution therefor.

LEARNED HAND,

*D. J.*

ENDORSED: "U. S. District Court, S. D. of N. Y.  
Filed Apr. 11, 1912. M."

1282

**Defendant's Petition for Appeal and  
Allowance.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1283

HENRY D. HOTCHKISS, as Trustee, etc.,  
Complainant,  
AGAINST  
NATIONAL CITY BANK,  
Defendant.

Petition for  
Appeal and  
Supersedeas.

The above-named defendant, feeling itself aggrieved by the interlocutory decree, made and entered in this cause on January 15, 1912, and the final decree, made upon the said interlocutory decree and the proceedings herein, and entered herein on April 11, 1912, does hereby appeal from the said final decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and prays that its appeal be allowed and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers

1284

1285 upon which the said decree was made, duly authenticated, may be sent to the United States Circuit Court for the Second Circuit;

And desiring to supersede the execution of the decree, petitioner tenders a bond, in such amount as the Court may require for such purpose, and prays that, with the allowance of the appeal, a supersedeas be issued.

SHEARMAN & STERLING,  
Solicitors for the defendant,

1286  
55 Wall Street,  
New York City.

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Petition granted and appeal allowed, and the said appeal shall operate as a supersedeas and stay of execution of the said decree, pending the appeal, upon the petitioner's filing a bond in the sum of Two hundred thousand Dollars. The undertaking of the defendant,  
1287 The National City Bank of New York, without surety, is hereby approved.

JULIUS M. MAYER,  
*D. J.*

**Defendant's Assignment of Errors.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

<b>HENRY D. HOTCHKISS, as Trustee,</b> etc.,  AGAINST  <b>NATIONAL CITY BANK.</b>	In Equity, Assignment of 1290 Errors.
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And now on this 15th day of April, 1912, comes the defendant, by its solicitors, Shearman & Sterling, and says that the decree entered in the above cause on April 11, 1912, is erroneous and unjust to the defendant, and assigns the following errors :

**First :** The District Court of the United States for 1291 the Southern District of New York erred in finding that, at the time of the delivery to the defendant of the securities described in the Bill of Complaint herein, the firm of Lathrop, Haskins & Co., and the individual members thereof, were insolvent.

**SECOND :** The said Court erred in finding that, at the time of the delivery of the said securities, the liabilities of the said firm exceeded the fair value of its assets, and that competent evidence of the fair value of its assets was offered, upon the trial. 1292

**THIRD :** The said Court erred in admitting in evidence the schedules in bankruptcy of the said firm.

**FOURTH :** The said Court erred in finding that the defendant is in the class of general creditors of the said firm, and in not finding that there are no creditors of the said firm of the same class as the defendant.

**FIFTH :** The said Court erred in finding that the effect of the transfer of the said securities would be to

1293 enable the defendant to obtain a greater percentage of its debt than other creditors of the same class.

SIXTH : The said Court erred in finding that the said firm intended, by the delivery of the said securities, to prefer the defendant over other creditors.

SEVENTH : The said Court erred in finding that, at the time of the delivery of the said securities, the defendant knew that the said firm, and the individual members thereof, were insolvent, and had reasonable cause to believe that it was intended by the said firm, 1294 in the delivery of the said securities, to give the defendant a preference.

EIGHTH : The said Court erred in not finding that the securities were delivered and received in the honest belief that the defendant had a valid and enforceable right thereto.

NINTH : The said Court erred in finding that there was no usage or agreement applicable to the clearance loan, made by the defendant to the said firm on January 19, 1910, whereby the loan should be secured, at 1295 all times, by the securities obtained by means of the said loan, and their proceeds, in whatever form.

TENTH : The said Court erred in not finding that the said firm and the defendant intended that the said loan should be thus secured at all times.

ELEVENTH : The said Court erred in not finding that the said securities were delivered to the defendant pursuant to such usage and agreement between the defendant and the said firm.

TWELFTH : The said Court erred in not finding that 1296 the securities obtained by means of the said loan were delivered pursuant to such usage and agreement and that the defendant had and has an equitable right to retain the same, as security for the unpaid balance of the said loan.

THIRTEENTH : The said Court erred in not finding that the defendant became subrogated to the rights of the creditors of the said firm, to whom payment was made by the said firm out of the proceeds of the said loan.

FOURTEENTH : The said Court erred in overruling 1297 the exceptions, filed by the defendant, to the report of the Special Master herein, dated October 17, 1911, and each of them, and in confirming the said report.

FIFTEENTH : The said Court erred in adjudging that the transfer of the said securities constituted a preference, voidable under Section 60 of the Bankruptcy Act, and in setting aside the said transfer.

SIXTEENTH : The said Court erred in not holding that the defendant had and has an equitable right to retain the said securities, as against the complainant 1298 and all creditors of the said firm.

SEVENTEENTH : The said Court erred in granting judgment to the complainant, as prayed for in the Bill of Complaint herein.

EIGHTEENTH : The said Court erred in not dismissing the Bill of Complaint herein.

WHEREFORE, the defendant prays that the said decree be reversed and that the said Court be directed to dismiss the Bill of Complaint herein, with costs.

SHEARMAN & STERLING, 1299  
Solicitors for Defendant,  
55 Wall Street,  
New York City.

1301

### **Defendant's Undertaking on Appeal.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

**1302 HENRY D. HOTCHKISS, as Trustee,  
etc.,**  
**Complainant,**  
**AGAINST** }  
**NATIONAL CITY BANK,**  
**Defendant.** }  
**Undertaking  
on Appeal.**

1303 Know all men by these presents, that The National City Bank of New York is held and firmly bound unto the above named Complainant, Henry D. Hotchkiss, as Trustee in Bankruptey of Henry S. Haskins and Henry Leverich, individually, and as copartners, with Fannie G. Lathrop, as special partner, under the firm name and style of Lathrop, Haskins & Company, Bankrupts, in the sum of Two hundred thousand Dollars (\$200,000), conditioned that, whereas a decree  
1304 was entered in this cause against the above named defendant on April 11, 1912, and the said defendant has appealed to the United States Circuit Court of Appeals for the Second Judicial Circuit, to reverse the

Now, therefore, if the above named defendant, The National City Bank of New York, sued as National City Bank, shall prosecute its said appeal to effect and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void;

Defendant's Undertaking on Appeal. 327

otherwise the same shall remain in full force and 1305 virtue.

Signed, sealed and acknowledged this 16th day of April, 1912.

THE NATIONAL CITY BANK OF NEW YORK,

By

(Corporate Seal.)

W. A. SIMONSON,

Vice-President.

Attest:

A. KAVANAGH,

Cashier.

1306

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STATE OF NEW YORK, }  
County of New York. }

On this 16 day of April, 1912, before me personally appeared William A. Simonson, to me known, who, being by me duly sworn, did depose and say that he 1307 resides in the Borough of Manhattan, City, County and State of New York; that he is a Vice-President of The National City Bank of New York, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation and that he signed his name thereto by like order.

1308

WALTER H. TAPPAN,

(Notarial Seal.)

Notary Public,

New York.

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Approved as to form and sufficiency of security.

ABRAM I. ELKUS & WM. S. MCGUIRE,  
Solicitors for Complainant.

328      Complainant's Petition for Appeal and  
Allowance.

1309

**Complainant's Petition for Appeal and  
Allowance.**

UNITED STATES DISTRICT COURT,  
1310      SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee in  
Bankruptcy, etc.,  
Complainant,

AGAINST

Petition for Ap-  
peal and Al-  
lowance.

1311      NATIONAL CITY BANK,  
Defendant.

The above-named complainant, Henry D. Hotchkiss, feeling himself aggrieved by that portion of the final decree made in the above-entitled cause on April 8th, 1912, and entered on April 11th, 1912, which confirmed the report of the Hon. CHARLES F. BROWN, 1312 Special Master herein, made and filed on March 6th, 1912, which said report overruled complainant's objections to defendant's account as filed herein, and confirmed said account as filed by defendant, does hereby appeal from said portion of said final decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers on which the said decree was made,

Complainant's Petition for Appeal and      329  
Allowance.

1313

duly authenticated, may be sent to the United States  
Circuit Court of Appeals for the Second Circuit.

Dated April 25, 1912.

ABRAM I. ELKUS and WILLIAM S. MCGUIRE,  
Solicitors for Complainant,  
Office and Post Office Address :  
No. 170 Broadway,  
Borough of Manhattan,  
City of New York.

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Petition granted and appeal allowed.

JULIUS MAYER,  
*U. S. D. J.*

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330 Complainant's Assignment of Errors.

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**Complainant's Assignment of Errors.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1318 HENRY D. HOTCHKISS, as Trustee, in  
Bankruptey, etc.,  
Complainant,  
AGAINST  
NATIONAL CITY BANK,  
Defendant.

Assignment of  
Errors.

And now, on this 24th day of April, 1912, comes the  
1319 complainant by his solicitors, Messrs. Abram I. Elkus  
and William S. McGuire, and says that the decree  
entered in the above entitled cause on April 11, 1912,  
is in part erroneous and unjust to the complainant,  
and assigns the following errors:

FIRST: The District Court of the United States for  
the Southern District of New York erred in denying  
complainant's motion to disaffirm the report of the  
HON. CHARLES F. BROWN, Special Master, entered  
herein on March 6th, 1912, and in confirming the said  
1320 report.

SECOND: The said Court erred in overruling com-  
plainant's exceptions to the said report.

THIRD: The said Court erred in overruling the com-  
plainant's objection to defendant's account of its dis-  
position of the securities set forth in Schedule "A"  
annexed to the Bill of Complaint herein, and in con-  
firming this account as filed by defendant.

FOURTH: The said Court erred in not adjudging that  
complainant is entitled to the return by defendant of  
the securities set forth in Schedule "A" annexed to

the Bill of Complaint herein *in specie*, together with 1321 all interest and dividends received thereon by defendant, with interest upon every such item of interest and dividends from the date of its receipt by defendant to April 11th, 1912, the date of entry of the final decree herein, and an additional sum equal to the difference between the conceded market value of said securities at the time they were taken by defendant and their market value on April 11th, 1912; or, in the alternative, that complainant is entitled to recover from defendant, the market value of said securities on January 1322 19th, 1910, together with interest thereon from January 19th, 1910, to April 11th, 1912, the date of the entry of the final decree herein.

Wherefore complainant prays that the said decree be reversed in so far as it confirms the report of the Special Master, filed herein on March 6th, 1912, and fails to award judgment to complainant as herein-before set forth in paragraph "Fourth" hereof, and that said decree be in all respects affirmed, with costs to complainant. 1323

ABRAM I. ELKUS and WILLIAM S. MCGUIRE,  
Solicitors for complainant,  
Office and Post Office Address,  
No. 170 Broadway,  
Borough of Manhattan,  
New York City.

332

Stipulation Waiving Citation.

1325

**Stipulation Waiving Citation.**

UNITED STATES DISTRICT COURT,

1326

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee, etc.,

AGAINST

NATIONAL CITY BANK.

1327 Both the complainant and the defendant having appealed from the decree, entered herein April 11, 1912;

It is hereby stipulated, that the issue and service of citations upon the said appeals be waived.

New York, May 6, 1912.

ABRAM I. ELKUS & WM. S. MCGUIRE,

Solicitors for Complainant.

SHEARMAN & STERLING,

Solicitors for Defendant.

1328

Stipulation.	333
	1329

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

<b>HENRY D. HOTCHKISS, as Trustee, etc.,</b> <b>Complainant, Appellee and Appellant,</b>  <b>AGAINST</b>  <b>NATIONAL CITY BANK,</b> <b>Defendant, Appellant and</b> <b>Appellee.</b>	<b>1330</b>  <b>1331</b>
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The within, embraced within the foregoing pages numbered from 1 to 332, inclusive, are true copies of the testimony, exhibits, pleadings, court orders, &c., composing the entire Record on Appeal herein, which the parties hereto have stipulated to print.

Dated, New York, September 3, 1912.

**ABRAM I. ELKUS & WM. A. BARBER,**  
**Solicitors for complainant, appellee and appellant. 1332**  
**SHEARMAN & STERLING,**  
**Solicitors for defendant, appellant and appellee.**

1333

## UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee,  
etc.,  
Complainant, Appellee and  
Appellant,

1334

AGAINST

NATIONAL CITY BANK,  
Defendant, Appellant and  
Appellee.

1335

UNITED STATES OF AMERICA, { ss.  
Southern District of New York, }

I, THOMAS ALEXANDER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of such portions of the record of the District Court in the above entitled cause as it is stipulated between counsel shall constitute the entire Record on Appeal herein.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereto affixed at the City of New York, in the Southern District of New York, this third day of September, in the year of our Lord One thousand nine hundred and twelve, and of the Independence of the said United States the One hundred and thirty ~~sixth~~<sup>seventh</sup>.

THOMAS ALEXANDER,

[SEAL.]

Clerk.

United States Circuit Court of Appeals for the Second Circuit.

Argued November 14, 1912; Decided December 9, 1912.  
November 18, 1912.

No. 55-127, October Term, 1912.

IRVING L. ERNST et al., as Trustee, etc., Complainants-Appellees,  
*vs.*  
THE MECHANICS' AND METALS NATIONAL BANK OF THE CITY OF  
NEW YORK, Defendant-Appellant.

Before Lacombe, Coxe, and Ward, Circuit Judges.

HENRY D. HOTCHKISS, as Trustee, etc., Complainant-Appellant,  
*vs.*  
THE NATIONAL CITY BANK OF NEW YORK, Defendant-Appellant.

Appeals from the District Court of the United States for the  
Southern District of New York.

Before Lacombe, Ward, and Noyes, Circuit Judges

WARD, *Circuit Judge*:

These cases are alike in respect to the main question involved, which is said to be of great importance to the business of stock brokers in New York City and may be disposed of together as to it. Certain features in which they differ will be considered separately.

January 19, 1910, between twelve and one o'clock, the stock broking firms of J. M. Fiske & Company and Lathrop, Haskins & Company failed, as the result of the collapse of a pool or pools in the stock of the Columbus & Hocking Valley Coal & Iron Company.

At the beginning of banking hours on that day Fiske & Company had arranged for a day or clearance loan of \$400,000 from the Mechanics, now the Mechanics & Metals National Bank, and Lathrop, Haskins & Company had arranged for one of \$500,000 from the National City Bank. The banks becoming uneasy about the financial condition of the brokers as the day progressed, demanded security for their accounts and obtained from each a large quantity of collaterals. Between twelve and one o'clock the firms notified the Stock Exchange that they were unable to meet their engagements and subsequently each was adjudicated a bankrupt. The trustee of each estate brought a plenary action in equity for recovery of the securities or their value as a preference voidable by him under Sec. 60 of the Bankruptcy Act and also in the case of Fiske & Company for some \$54,000 in cash deposited by them on the morning of the 19th in their account with the bank. The proceedings were referred to a Special Master, who took testimony and reported that each transaction was a voidable preference and directed the banks to account

1333

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HENRY D. HOTCHKISS, as Trustee,  
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[SEAL.]

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for the securities and cash to the trustees in bankruptcy of the failed firms. This report was confirmed by the District Court and the banks have taken the appeals which are now to be disposed of.

Fiske & Company had been dealing with the Mechanics National Bank since November 8, 1901, under the following written contract:

"Know all men by these presents, That the undersigned, in consideration of financial accommodations given, or to be given, or continued to the undersigned by the Mechanics' National Bank of the City of New York, hereby agree with the said Bank that whenever the undersigned shall become or remain directly or contingently, indebted to the said bank for money lent, or for money paid for the use or account of the undersigned, or for any overdraft or upon any endorsement, draft, guarantee, or in any other matter whatsoever, or upon any other claim, the said Bank shall then and thereafter have the following rights, in addition to those created by the circumstances from which such indebtedness may arise against the undersigned, or his, or their executors, administrators or assigns, namely:

1. All securities deposited by the undersigned with said Bank, as collateral to any such loan or indebtedness of the undersigned to said Bank shall also be held by said Bank as security for any other liability of the undersigned to said Bank, whether then existing or thereafter contracted; and said Bank shall also have a lien upon any balance of the deposit account of the undersigned with said Bank existing from time to time, and upon all property of the undersigned of every description left with said Bank for safe keeping or otherwise, or coming to the hands of said Bank in any way, as security for any liability of the undersigned to said Bank now existing or hereafter contracted.

2. Said Bank shall at all times have the right to require from the undersigned that there shall be lodged with said Bank as security for all existing liabilities of the undersigned to said Bank, approved collateral securities to an amount satisfactory to said Bank; and upon the failure of the undersigned at all times to keep a margin of securities with said Bank for such liabilities of the undersigned satisfactory to said Bank, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said Bank shall at the option of said Bank become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

3. Upon failure of the undersigned either to pay any indebtedness to said Bank when becoming or made due, or to keep up the margin of collateral securities above provided for, then and in either event said Bank may immediately without advertisement, and without notice to the undersigned, sell any of the securities held by it as against any or all of the liabilities of the undersigned, at private sale or Broker's Board or otherwise and apply the proceeds of such sale as far as needed toward the payment of any or all such liabilities together with interest and expenses of sale, holding the undersigned responsible for any deficiency remaining unpaid after such applica-

tion. If any such sale be at Broker's Board or at public auction, said Bank may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid, said Bank may also apply toward the payment of the said liabilities all balances of any deposit account of the undersigned with said Bank then existing.

It is further agreed that these presents constitute a continuing agreement, applying to any and all future as well as to existing transactions between the undersigned and said Bank."

On January 19th they applied for a day loan (which was granted), as follows:

"NEW YORK, January 19, 1910.

Mechanics National Bank, New York City:

Please loan us today \$400,000. Crediting this amount to our account, and oblige.

J. M. FISKE & COMPANY."

On the same day Lathrop, Haskins & Company applied to the National City Bank for a day loan of \$500,000 and signed two notes differing only in amount, in the following form:

"\$300,000.

NEW YORK CITY, January 19, 1910.

On demand for value received we promise to pay to The National City Bank of New York, or order, Three hundred thousand (\$300,000) Dollars, hereby agreeing that said Bank shall have a lien upon all property of the undersigned now or hereafter in its possession or under its control, as security for any indebtedness of the undersigned now existing or hereafter contracted, with the right at any time to demand additional security, and with the right, upon default in payment, to sell, without advertisement or notice to the undersigned, any or all of the securities or property so held, at public expense or private sale, or to otherwise dispose of the same in the discretion of any of the officers of said Bank, applying the proceeds upon the said indebtedness together with interest and expenses, legal or otherwise, the undersigned to be liable for any deficiency.

LATHROP, HASKINS CO."

The proofs show that in New York City contracts of brokers to deliver stock sold and to pay for stocks purchased must be carried out the next day and that credit from banks is absolutely necessary to enable them to release the securities they have sold, which are generally pledged in banks or trust companies, and with their proceeds to pay for the securities they have bought. To enable them to clear these transactions the banks at 10 A. M. of each business day extend a credit which must be repaid by 3 P. M. of the same day. These loans are made from day to day and are called day or clearance loans, no interest being charged upon them.

We have no doubt that both the firms in question were insolvent when they delivered the securities and deposited the cash and that

the banks had reasonable cause to believe so. But it is not every transfer by an insolvent within the four months' period that is voidable by the trustee. It must be on account of a pre-existing debt. When one gives an insolvent present value for a transfer of property or when he makes an exchange of property, there is no preference. Authorities upon this subject may be found in Collier on Bankruptcy, 8th Edition, page 664, and Loveland on Bankruptcy, 4th Edition, See, 512.

No doubt a contract might be made between a bank and a broker stipulating that the day loan should be used specifically for the release of the broker's pledged securities and that their proceeds or the proceeds of substituted securities should be immediately deposited in the bank in repayment of the loan. As it would not be possible for the bank itself to send around checks to the various trust companies and actually take up the pledged securities belonging to its stock broking depositors and deliver them to purchasers against payment of the price, the agreement of the broker to do this would make him agent or trustee of the bank and would seem to be quite sufficient to bring the transaction within the cases held not to constitute preferences. The loan and repayment the same day should be regarded as one transaction, the fact that they were not literally contemporaneous being a necessary result of the nature of the business. It would not be possible to act like a farmer, who holds the cow's tail in one hand until he gets payment for her in the other. We think it would make no difference under such a contract, that the bank did not know what specific securities were to be released or that it permitted the broker to deliver the same to purchasers. See on the subject generally, *Sexton vs. Kessler*, 172 F. R., 535; 225 U. S., 90; *Mills vs. Virginia-Carolina Lumber Co.*, 164 F. R., 168. A particularly apposite case is *Dessel vs. North State Lumber Co.*, 119 F. R., 531.

In these cases the banks seek to escape by claiming that they had an equitable lien upon the securities subsequently delivered and cash deposited by the brokers and that they were receiving only their own property. Each of them, however, admits that it made the day loan under the written agreements above mentioned. Each contained provisions as to securities in the possession, but none as to securities not in the possession of the bank. Those in question here were not in the possession of the banks. Moreover, neither the banks nor the brokers when the transfers were made spoke of securities specifically covered by their loans. The banks simply demanded security generally and took whatever they could get. The conduct of the parties at the time is inconsistent with any claims to specific securities or their proceeds. We see no ground for claiming an equitable lien under these contracts alone.

The banks, however, also allege a usage of the business which requires the clearance loan to be so applied which they seek to annex to the written contracts. It is objected that such a usage cannot be proved, because it contradicts or adds to the written contract. We do not think the usage contradicts the contracts because they contemplated collateral delivered against loans, whereas these day or clear-

ance loans are never made against collateral. Proof of such a usage would only be as to the way in which the day loans were to be applied and would be entirely consistent with the written contracts. It may very well be that if the broker failed to carry out the contract, equity would not aid the bank to the prejudice of creditors generally, but this is no ground for saying that if the contract had been carried out, equity would intervene to disturb it.

The following extract from a stipulation made in the case is the best statement made in support of the banks' claim:

"It is further stipulated that if members of the stock exchange houses to which the said banks made the said so-called day or clearance loans were called as witnesses herein, each of the said brokers called would testify respectively that the amount of the so-called day or clearance loan was credited to his general account with the bank; that in this general account there was also credited the balance he had on deposit with the bank at the opening of the day.

That all of the moneys received by him in the course of his business throughout the day, from whatever source, was deposited with the bank making the so-called day or clearance loan, and credited to his general account as aforesaid.

That in the course of the day he drew and had certified checks against the said account which were used to pay off demand or time loans and obtain the release of securities held as collateral thereto, or to take up stocks, bonds or other securities which he had agreed to purchase, or to borrow stock for delivery, or for the substitution of securities, but it was expected and understood that no portion of the proceeds of the day or clearance loan was used for any purpose other than to clear securities, although the broker is at liberty to draw against the balance standing to the credit of his account in excess of that derived from said day or clearance loan to pay the general expenses of his business and to meet the general obligations thereof.

That the securities he received as aforesaid were not kept separate but were mingled with all the other securities coming into his possession in the course of his daily business, and that the said securities were freely and at all times used by him to make deliveries on sales made in the course of his business, or were used as collateral in new demand or time loans or were substituted for other collateral then in demand or time loans.

That he kept no separate account of the moneys received on the deliveries of stock acquired by him as before mentioned, but that all the moneys received by him, in the course of the day, from whatever source, were deposited by him to the credit of his said account with the bank making the said loan.

That the said day or clearance loans were paid off by his check or checks drawn to the order of the bank, at the close of the day. That during the day, as soon as checks were received by him from the sale of securities cleared by the proceeds of the day or clearance loan, or as soon as moneys were received by the broker from new loans made with the securities cleared by the day or clearance loan, the checks or moneys resulting therefrom were promptly deposited with the bank during the day as soon as or within a reasonable time after

the same were received; and that in order to pay off such day or clearance loans, if he had not sufficient funds on deposit with said bank which made such day or clearance loans, it would be necessary for him to obtain a demand or time loan at the Stock Exchange for and on behalf of the identical bank making the day or clearance loan as aforesaid. The collateral security used for such demand or time loan might be any or all securities in his (the broker's) possession from whatever source and however those securities were acquired by him; or he, the broker, might, if occasion required, apply directly to the bank making the said day or clearance loan for a new demand loan on such securities in his possession as aforesaid, as would be acceptable to the bank, in order to discharge his indebtedness under the day or clearance loan at the close of the day. The amount of such loan would be credited to his general account with the bank and the so-called day or clearance loan would be paid at the close of the day by check drawn against this account."

We do not think that the usage alleged was proved. It was abundantly established that the brokers do repay banks for the clearance loan on the same day and generally with the proceeds of the released securities or of substituted securities and that it is understood or expected that this shall be done. This, however, only shows the way in which the business is done. It could hardly be done and certainly could not be continued in any other way. Such a course of business does not establish that the brokers have agreed to do these things or are bound by usage to do them or that the banks are entitled to the proceeds of the released securities. Indeed, we understand that the question as to the rights and obligations of the parties if the broker fails to repay or secure the clearance loan on the day it was made is raised for the first time in the cases now under consideration. Therefore, we agree with the conclusion of the Special Master and the court below on the main question involved in both cases.

There are two particulars in which the cases differ from each other, now to be considered separately.

In the case of the National City Bank, the Trustee claims that he is entitled to the value of the securities at the time they were transferred, they having in the meantime depreciated considerably. The Bankruptcy Act, Sec. 60 (b) does provide that in the case of a voidable preference the trustee "may recover the property or its value." The Special Master and the court below, however, held and we think rightly, that the Trustee had left the disposition of the securities to the absolute discretion of the bank, their proceeds, if sold, to stand in their place. Under such circumstances, it would be inequitable to hold the bank liable for the depreciation. All the Trustee is entitled to is a return of the securities and an accounting as to any dividends or interest collected in the meantime.

In the case of the Mechanics National Bank, a deposit was made by Fiske & Company on the morning of January 19, which the Trustee claims should be returned with interest as a voidable preference. This for the reason that the bank had ordered no more certifications to be made before the deposit was received, which it is contended was

a closing of the account, so that the relation of debtor and creditor between the firm and the bank did not exist as to this fund. The Special Master and the court below held that the deposit was made after the bank had knowledge of the broker's insolvency, or at least was put on inquiry, so that the deposit was a voidable preference, just as much as the delivery of the securities. In this view we concur. The decrees are affirmed.

L. H. Freedman for the Appellant.

D. P. Hays for the Appellees.

John A. Garver for the Defendant.

A. L. Elkus for the Complainant.

United States Circuit Court of Appeals for the Second Circuit,  
October Term, 1912.

Argued November 14, 1912; Decided December 9, 1912.

No. 55—127.

HENRY D. HOTCHKISS, as Trustee, etc., Complainant-Appellant,  
**vs.**  
THE NATIONAL CITY BANK OF NEW YORK, Defendant-Appellant.

Appeals from the District Court of the United States for the  
Southern District of New York.

Before Lacombe, Ward, and Noyes, Circuit Judges.

NOYES, *Circuit Judge* (concurring):

I concur in the conclusion reached in the National City Bank case, and in the opinion except so far as it discusses the question whether a valid contract could be made to cover the situation. I think that question does not arise in the case and prefer to express no opinion upon it.

At a Stated Term of the United States Circuit Court of Appeals in  
and for the Second Circuit, Held at the Court Rooms in the Post  
Office Building in the City of New York, on the 19th Day of De-  
cember One Thousand Nine Hundred and Twelve.

**Present:**

Hon. E. Henry Laeombe,  
Hon. Henry G. Ward,  
Hon. Walter C. Noyes,  
Circuit Judges.

**HENRY D. HOTCHKISS**, as Trustee, etc., Complainant-Appellant,  
vs.

**NATIONAL CITY BANK OF NEW YORK**, Defendant-Appellant.

Appeals from the District Court of the United States for the  
Southern District of New York.

This cause came on to be heard on the transcript of record from  
the District Court of the United States, for the Southern District of  
New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and  
decreed that the decree of said District Court be and it hereby is  
affirmed without costs.

It is further ordered that a Mandate issue to the said District Court  
in accordance with this decree.

E. H. L.

H. G. W.

Endorsed: United States Circuit Court of Appeals, Second Circuit.  
H. D. Hotchkiss vs. Nat. City Bk. of N. Y. Order for Mandate.  
United States Circuit Court of Appeals, Second Circuit. Filed Dec.  
23, 1912. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

**THE NATIONAL CITY BANK OF NEW YORK**, Appellant,  
against

**HENRY D. HOTCHKISS**, as Trustee, etc., Appellee.

*Petition.*

Now comes The National City Bank of New York, the Appellant  
herein, by its solicitors, and complains that in the record and pro-  
ceedings and also in the rendition of the Decree of the United States  
Circuit Court of Appeals for the Second Circuit, rendered herein on  
the 19th day of December, 1912, and entered in the office of the  
Clerk of the said Circuit Court of Appeals for the Second Circuit on  
the 23rd day of December, 1912, affirming the decree of the United  
States District Court for the Southern District of New York, dated  
April 8, 1912, and entered on April 11, 1912, manifest error has

intervened, to the great damage of the appellant; that the jurisdiction of the said District Court of the United States for the Southern District of New York was dependent upon the fact that this suit was brought in equity by the Appellee herein, as Trustee in Bankruptcy, to set aside an alleged preferential transfer, under Section 60 of the Bankruptcy Act; that the amount involved herein exceeds the sum of Two thousand Dollars (\$2,000), besides costs, and that this is not a case in which the jurisdiction of the Circuit Court of Appeals is final.

Wherefore, the Appellant prays for an allowance of the appeal, to the end that the cause may be carried to the Supreme Court of the United States, and for a supersedeas of the said decree and of all proceedings for the execution thereof, and for such other process as is required to perfect the appeal prayed for, to the end that the error therein may be corrected.

SHEARMAN & STERLING,

*Solicitors for Appellant,  
55 Wall Street, Borough of Man-  
hattan, City of New York.*

Petition granted and appeal allowed, and the said appeal shall operate as a supersedeas and stay of execution of the said decree and of all decrees and proceedings taken under the mandate issued pursuant to the said decree, upon the appellant's filing and undertaking in the sum of Two hundred thousand Dollars (\$200,000). The undertaking of the Appellant, the National City Bank of New York, without surety, is hereby approved.

New York, January 14th, 1913.

(Sd.)

H. G. WARD,  
*Circuit Judge.*

(Endorsed:) U. S. Circuit Ct. of Appeals for the Second Circuit. The National City Bank of New York, Appellant, against Henry D. Hotchkiss, as Trustee, etc., Appellee. Petition for Appeal and Allowance. Shearman & Sterling, Solicitors for Appellant, 55 Wall Street, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 14, 1913. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

THE NATIONAL CITY BANK OF NEW YORK, Appellant,

against

HENRY D. HOTCHKISS, as Trustee, etc., Appellee.

*Assignment of Errors.*

And now comes the Appellant above named, by its solicitors, Shearman & Sterling, and says that the decree of the United States Circuit Court of Appeals for the Second Circuit, made in this cause on December 19, 1912, and entered on December 23, 1912, affirming

the decree of the United States District Court for the Southern District of New York, dated April 8, 1912, and entered on April 11, 1912, is erroneous and unjust to the Appellant, and assigns the following errors:

First. The said United States Circuit Court of Appeals for the Second Circuit erred in finding that the Appellant is in the class of general creditors of the firm of Lathrop, Haskins & Co., the bankrupts, and in not finding that there are no creditors of the said firm of the same class as the Appellant.

Second. The said Court erred in finding that the effect of the transfer to the Appellant of the securities, referred to in the bill of complaint herein, would be to enable the Appellant to obtain a greater percentage of its debt than other creditors of the same class.

Third. The said Court erred in finding that the said firm intended, by the delivery of the said securities, to prefer the Appellant over other creditors.

Fourth. The said Court erred in finding that, at the time of the delivery of the said securities, the Appellant knew that the said firm, and the individual members thereof, were insolvent, and had reasonable cause to believe that it was intended by the said firm, in the delivery of the said securities, to give the Appellant a preference.

Fifth. The said Court erred in not finding that the securities were delivered and received in the honest belief that the Appellant had a valid and enforceable right thereto.

Sixth. The said Court erred in finding that there was no usage or agreement applicable to the clearance loan, made by the Appellant to the said firm on January 19, 1910, whereby the loan should be secured, at all times, by the securities obtained by means of the said loan, and their proceeds, in whatever form, and in not finding that such usage and agreement existed and that the said firm and the Appellant intended that the said loan should be thus secured at all times.

Seventh. The said Court erred in not finding that the securities obtained by means of the said loan were delivered pursuant to such usage and agreement and that the Appellant had and has an equitable right to retain the same, as security for the unpaid balance of the said loan.

Eighth. The said Court erred in not finding that the Appellant became subrogated to the rights of the creditors of the said firm, to whom payment was made by the said firm out of the proceeds of the said loan.

Ninth. The said Court erred in finding that the exceptions, filed by the Appellant, to the report of the Special Master herein, dated October 17, 1911, and each of them, were properly overruled and that the said report was properly confirmed.

Tenth. The said Court erred in holding that the transfer of the said securities constituted a preference, voidable under Section 60 of the Bankruptcy Act, and that the said transfer should be set aside.

Eleventh. The said Court erred in not holding that the Appellant had and has an equitable right to retain the said securities, as against the Appellee and all creditors of the said firm.

Twelfth. The said Court erred in not finding that, upon the facts shown, the Appellant was equitably entitled to payment in full of the balance due to it from the bankrupts, and was entitled to retain the said securities to secure such payment.

Thirteenth. The said Court erred in holding that judgment was properly granted to the Appellee, as prayed for in the bill of complaint herein.

Fourteenth. The said Court erred in affirming the said decree, entered April 11, 1912.

Fifteenth. The said Court erred in not reversing the said decree and in not directing that the bill of complaint herein be dismissed.

Wherefore, the Appellant prays that the said decree of the said United States Court of Appeals for the Second Circuit be reversed, and that the bill of complaint herein be ordered dismissed, with costs.

· · · · ·  
SHEARMAN & STERLING,  
*Solicitors for Appellant, 55 Wall Street,*  
*New York City.*

(Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. The National City Bank of New York, Appellant, against Henry D. Hotchkiss, as Trustee, etc., Appellee. Assignment of Errors. Shearman & Sterling, Solicitors for Appellant, 55 Wall Street, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 14, 1913. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

THE NATIONAL CITY BANK OF NEW YORK, Appellant,  
against  
HENRY D. HOTCHKISS, as Trustee, etc., Appellee.

*Undertaking on Appeal.*

Know all men by these presents, that The National City Bank of New York is held and firmly bound unto the above named Appellee, Henry D. Hotchkiss, as Trustee in Bankruptcy of Henry S. Haskins and Henry Leverich, individually, and as copartners, with Fannie G. Lathrop, as special partner, under the firm name and style of Lathrop, Haskins & Company, Bankrupts, in the sum of Two hundred thousand Dollars (\$200,000.), conditioned that, whereas a final decree was entered in this cause against the above named appellant on April 11, 1912, and the United States Circuit Court of Appeals for the Second Circuit, by its decree, made on December 19, 1912, and entered on December 23, 1912, affirmed the said final decree, and the said appellant has appealed to the Supreme Court of the United States, to reverse the said decree of the said Circuit Court of Appeals;

Now, therefore, if the above named appellant, The National City Bank of New York, sued as National City Bank, shall prosecute its

said appeal to effect and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

Signed, sealed and acknowledged this 13 day of January, 1913.

THE NATIONAL CITY BANK OF NEW  
YORK,

(Sd.) By W. A. SIMONSON, *Vice-President.*

Attest:

[SEAL.] (Sd.) A. KAVANAGH, *Cashier.*

STATE OF NEW YORK,  
*County of New York:*

On this 13th day of January, 1913, before me personally appeared William A. Simonson, to me known, who, being by me duly sworn, did depose and say that he resides in the Borough of Manhattan, City, County and State of New York; that he is a Vice-President of The National City Bank of New York, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of the said corporation that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation and that he signed his name thereto by like order.

(Sd.) WILLIAM A. SIMONSON.

(Sd.) WALTER B. MATTESON.  
[NOTARIAL SEAL.] Notary Public, Kings Co.

Certificate filed New York Co.

Approved as to form and sufficiency of security.

ABRAM L. ELKUS AND  
WILLIAM A. BARBER,  
*Solicitors for Appellee.*

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. The National City Bank of New York, Appellant, against Henry D. Hotchkiss, as Trustee, etc., Appellee. Undertaking on Appeal, Shearman & Sterling, Solicitors for Appellant, 55 Wall Street, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 14, 1913. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

HENRY D. HOTCHKISS, as Trustee, etc., Appellee-Appellant,  
against  
THE NATIONAL CITY BANK OF NEW YORK, Appellant-Appellee.

*Petition.*

The above-named Henry D. Hotchkiss, as Trustee, etc., appellee-appellant, respectfully shows:

That the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit, and that a decree has therein been rendered on December 19th, 1912, and entered in the Office of the Clerk of said Court on December 23rd, 1912, affirming the decree of the District Court of the United States for the Southern District of New York, dated April 8th, 1912, and entered in the Office of the Clerk of said District Court on April 11th, 1912; and that the matter in controversy in said suit exceeds One Thousand Dollars besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Second Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore said appellee-appellant prays that an appeal be allowed him in the above-entitled cause directing the Clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors, herewith filed by the said appellee-appellant, may be reviewed and if error be found, corrected according to the laws and customs of the United States.

ABRAM I. ELKUS &  
WM. A. BARBER,

*Solicitors for Appellee-Appellant, Henry D.  
Hotchkiss, as Trustee, etc.*

Office & Post Office Address, No. 170 Broadway, Borough of Manhattan, City of New York.

It is hereby ordered that the appeal in the above-entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

H. G. WARD,  
*United States Circuit Judge, Second Circuit.*

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit, Henry D. Hotchkiss, as Trustee, etc., Appellee-Appellant, against The National City Bank of New York, Appellant-Appellee. Petition. Abram I. Elkus & Wm. A. Barber, Attorneys for Appellee-Appellant, No. 170 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 25, 1913. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

HENRY D. HOTCHKISS, as Trustee, etc., Appellee-Appellant,

against

THE NATIONAL CITY BANK OF NEW YORK, Appellant-Appellee.

*Assignment of Errors.*

Henry D. Hotchkiss, as Trustee, etc., appellee-appellant, by his counsel, Abram L. Elkus and William A. Barber, respectfully represents that he feels himself to be aggrieved by the proceedings and the decree of the United States Circuit Court of Appeals for the Second Circuit in the above-entitled cause, and assigns error thereto as follows:

Assignment No. 1. That the Circuit Court of Appeals of the Second Circuit erred in affirming that part of the final decree of the District Court which overruled complainant's exceptions as to the measure of damages filed to the report of the Special Master, dated March 5th, 1912, and which confirmed said report of the Special Master. (Fols. 1251-1258, 1279-1280.)

Assignment No. 2. That said Circuit Court of Appeals erred in affirming that part of the final decree of the District Court which adopted, against complainant's exceptions, the measure of damages found by the Special Master in his report, filed October 17th, 1911. (Fols. 1280-1282, 1960, 1003-1004.)

Assignment No. 3. That said Circuit Court of Appeals erred in affirming that part of the final decree of the District Court which adjudged that defendant was entitled to deliver to complainant in full satisfaction "the securities set forth in Schedule 'A' annexed to the bill of complaint herein, together with all interest and dividends received thereon by defendant from the time defendant received such securities to the date of such delivery \* \* \* and that in default of such delivery complainant have judgment against the defendant for the sum of \$161,740.62, with interest thereon from October 17th, 1911, to the date hereof." (Fols. 1280-1281.)

Assignment No. 4. That said Circuit Court of Appeals erred in affirming the final decree of the District Court in that against complainant's exceptions it failed to hold that complainant is entitled to the conceded value of the securities transferred (\$154,300.) at the time of the transfer, January 19th, 1910, together with interest from January 19th, 1910.

Assignment No. 5. That said Circuit Court of Appeals erred in affirming the final decree of the District Court in that against complainant's exceptions it failed to hold that complainant is entitled to recover from the defendant the securities in specie, set forth in "Schedule A" annexed to the bill of complaint herein, together with all interest and dividends received thereon by defendant, with interest upon every such item of interest and dividends from the date of its receipt by defendant to the entry of final judgment in the District Court, and an additional sum equal to the difference between

the conceded market value of the said securities at the time of the transfer to defendant, and their market value at the date of final judgment in the District Court.

Assignment No. 6. That said Circuit Court of Appeals erred in affirming the final decree of the District Court which overruled complainant's exceptions to and confirmed the report of the Special Master upon the accounting, dated March 5th, 1912, holding that under the stipulation of April 5th, 1910, (Fols. 1187-1193), between complainant and defendant, complainant had waived and lost his right to charge defendant with depreciation of the securities transferred, and had put it in the discretion of the Bank to sell the securities or not, as it saw fit, without liability for depreciation in case of no sale.

Assignment No. 7. That said Circuit Court of Appeals erred in affirming the final decree of the District Court, which, against the exceptions of complainant, confirmed the report of the Special Master, dated March 5th, 1912, holding complainant was not entitled to charge defendant with depreciation of the securities between January 19th, 1910, the date of the transfer, and April 5th, 1910, the date of the stipulation, regarding the sale of said securities, and was not entitled to charge defendant with depreciation occurring between January 19th, 1910, and April 25th, 1910, the date when the said stipulation was approved by the District Court.

Assignment No. 8. That said Circuit Court of Appeals erred in affirming the final decree of the District Court, which, against complainant's exceptions, confirmed the reports of the Special Master, filed October 17th, 1911, and March 5th, 1912, holding that complainant had elected to sue defendant for the securities in specie and was not entitled to charge defendant with the value of the securities at the time of the transfer with interest.

Assignment No. 9. That said Circuit Court of Appeals erred in affirming the final decree of the District Court in that said final decree fails to provide for the recovery of interest on dividends received, as provided for in the report of the Special Master, filed October 17th, 1911, which report was confirmed by the District Court, and in that the alternative recovery, provided by said final decree (Fol. 1281), of \$161,740.62 does not conform to the real findings of the Special Master and should be \$162,440.62. (Fols. 899-900, 925.)

Wherefore the said appellee-appellant prays that the said decree of the United States Circuit Court of Appeals for the Second Circuit be reversed in the matters and respects hereinabove assigned as error with costs to said appellee-appellant.

ABRAM I. ELKUS AND  
WILLIAM A. BARBER,  
*Solicitors for Henry D. Hotchkiss, as Trustee, etc.,*  
*Appellee-Appellant.*

Office & Post Office Address: 170 Broadway, Borough of Manhattan, New York City.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. Henry D. Hotchkiss, as Trustee, etc., Appellee-Appellant, against The National City Bank of New York, Appellant-Appellee. Assignment of Errors. Abram L. Elkus & Wm. A. Barber, Attorneys for Appellee-Appellant, No. 170 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 25, 1913. William Parkin, Clerk.

UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 365 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Henry D. Hotchkiss, as Trustee, etc., Complainant against National City Bank of New York, Defendant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 28th day of January in the year of our Lord One Thousand Nine Hundred and thirteen and of the Independence of the said United States the One Hundred and thirty-seventh.

[Seal United States Circuit Court of Appeals, Second Circuit.]  
WILLIAM PARKIN, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

THE NATIONAL CITY BANK OF NEW YORK, Appellant,  
against  
HENRY D. HOTCHKISS, as Trustee, etc., Appellee.

*Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Henry D. Hotchkiss, as Trustee in Bankruptcy of Henry S. Haskins et al., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, D. C., within thirty days after the date hereof, pursuant to an appeal filed in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit, wherein The National City Bank of New York is Appellant and you are Appellee, to show cause, if any there be, why the decree of the said Circuit Court of Appeals for the Second Circuit, referred to in the said appeal, should not be corrected

and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Edward D. White, Chief Justice of the United States, this 14th day of January, 1913.

H. G. WARD,  
*Circuit Judge.*

[Endorsed:] U. S. Circuit Court of Appeals for the Second Circuit. The National City Bank of New York, Appellant, against Henry D. Hotchkiss, as Trustee, etc., Appellee. Citation. Shearman & Sterling, Solicitors for Appellant, 55 Wall Street, N. Y. Service of a copy of the within is hereby admitted. New York: Jan. 14, 1913. Abram L. Elkus & Wm. A. Barber, Solicitors for Appellee. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 14, 1913. William Parkin, Clerk.

UNITED STATES OF AMERICA,  
*Second Circuit:*

The United States Circuit Court of Appeals, Second Circuit.

The President of the United States of America to The National City Bank of New York, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, thirty (30) days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, wherein Henry D. Hotchkiss, as Trustee, etc., is appellant, and you are appellee, to show cause, if any there be, why the decree of said Circuit Court of Appeals for the Second Circuit, referred to in the petition for appeal herein, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Hon. Edward D. White, Chief Justice of the Supreme Court of the United States, this 25th day of January in the year One Thousand Nine Hundred and Thirteen (1913).

H. G. WARD,  
*Judge of the United States Circuit Court of Appeals, Second Circuit.*

Service of a copy of the within Citation is hereby admitted this 25 day of January, 1913.

SHEARMAN & STERLING,  
*Solicitors for The National City Bank of New York, Appellant-Appellee.*

[Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Henry D. Hotchkiss, as Trustee, etc., Appellee-Appellant, against The National City Bank of New York, Appellant-App-

pellee. Original. Citation. Abram I. Elkus & Wm. A. Barber, Attorneys for Appellee-Appellant, No. 170 Broadway, Borough of Manhattan, New York City.

Endorsed on cover: File No. 23,549. U. S. Circuit Court Appeals, 2nd Circuit. Term No. 974. The National City Bank of New York, appellant, vs. Henry D. Hotchkiss, as trustee in bankruptcy of Henry S. Haskins et al. File No. 23,550. Term No. 975. Henry D. Hotchkiss, as trustee in bankruptcy of Henry S. Haskins et al., appellant, vs. The National City Bank of New York. Filed February 17th, 1913. File No. 23,549 & 23,550.

L  
Supreme Court, U. S.  
FILED.

OCT 17 1913

JAMES H. MCKENNEY,  
*CLERK.*

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# Supreme Court of the United States.

OCTOBER TERM, 1913, No. 459.

(Originally No. 974, October Term, 1912.)

THE NATIONAL CITY BANK OF NEW YORK,  
*Appellant,*  
*against*

HENRY D. HOTCHKISS, as Trustee in Bankruptcy of  
Henry S. Haskins and others,  
*Appellee.*

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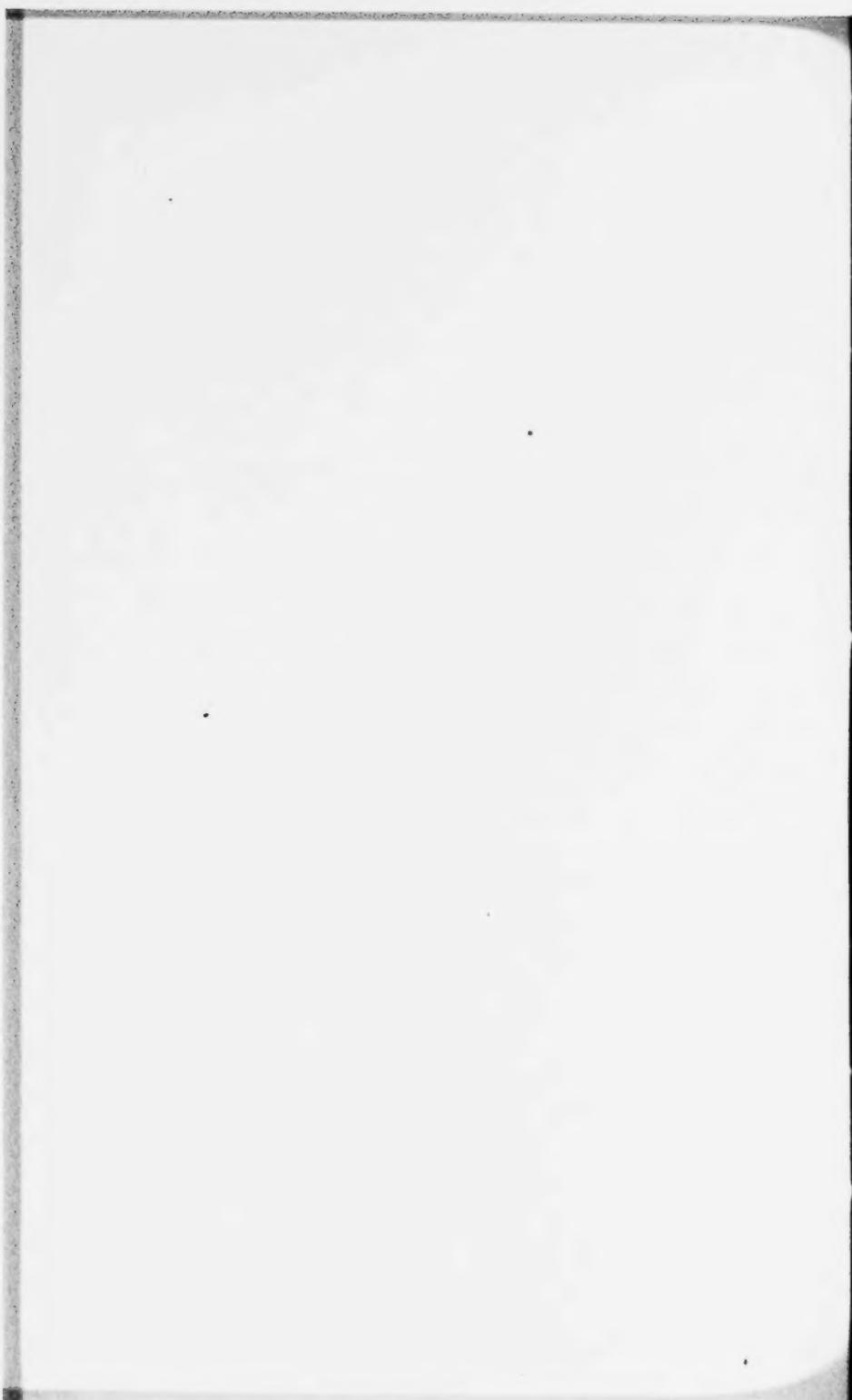
APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.

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## BRIEF FOR APPELLANT.

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JOHN A. GARVER,  
*Solicitor and Counsel for Appellant,*  
55 WALL STREET,  
New York.



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**Supreme Court of the United States,**

OCTOBER TERM, 1913. No. 459.

(Originally, No. 974, October Term, 1912.)

THE NATIONAL CITY BANK OF NEW  
YORK (Defendant below),  
*Appellant,*

AGAINST

HENRY D. HOTCHKISS, as Trustee in  
Bankruptcy of Henry S. Haskins,  
Henry Leverich, individually, and  
Fannie G. Lathrop, special part-  
ner, and as copartners trading  
under the firm name of Lathrop,  
Haskins & Co. (Complainant  
below),

*Appellee.*

*Brief for  
Appellant.*

**Statement.**

Appeal by defendant below from a final decree of the United States Circuit Court of Appeals for the Second Circuit, affirming a decree of the United States District Court, for the Southern District of New York, in favor of the complainant, as trustee in bankruptcy of the firm of Lathrop, Haskins & Co., setting aside, as an unlawful preference, a delivery of certain securities, valued at about \$150,000, made by the said firm of Lathrop, Haskins & Co. to the defendant, on January 19, 1910.

The securities were delivered to the Bank before 3 p. m. (fols. 456-7, 552). The petition in bankruptcy was filed at 4:10 p. m. (fol. 85). Lathrop,

Haskins & Co. were stock brokers in the City of New York, Mr. Haskins being the Stock Exchange member (fol. 864). They and their predecessors had kept their bank account with the appellant for many years ; and they had no other bank account (fol. 907). The securities in question were delivered to make good a balance due to the appellant on a so-called "clearance loan" of \$500,000, made the same morning ; and nearly all of these securities the bankrupts had been enabled to get possession of by using the proceeds of that loan (fols. 395-401).

The question involved in this appeal is whether, on the particular facts in this case and in view of the nature of "clearance loans" and the relations existing between the bankrupts, their customers and the appellant, this delivery constituted a voidable preference under Section 60b of the Bankruptcy Act.

The buying and selling of securities in the City of New York involves daily transactions amounting to many millions of dollars. The extent of this business is so great, its influence so far reaching and the manner in which it is conducted so widely and generally known, that the courts will take judicial notice of it, as they do of all commercial transactions of a general nature. The appellant, however, gave affirmative proof of the manner in which this business is conducted.

In New York, securities are deliverable on the day following their sale (fol. 630). The transactions are of such exceptional magnitude, that it would not be possible to conduct the business with the capital of the brokers who are engaged in it. They are enabled to pay for the securities which they purchase only by the proceeds of the securities which they sell and by hypothecating the securities purchased on a margin. The deliveries of purchases and sales proceed simultaneously. Consequently, the broker is obliged to obtain temporary credit to pay for the securities deliverable to him, while he is receiving the proceeds of the securities which he is delivering to his purchasers. At the same time, the nature of the business requires him to carry large amounts of securities on a margin for his customers, that is, to advance a large portion of their cost ; and, upon such securities, he can

obtain the ordinary demand loans, which may be called at any time and the securities in which are constantly changing by reason of their sale, or otherwise ; so that, in addition to a temporary loan to make his clearances, that is, to pay for securities deliverable to him, the broker must have accommodation to enable him to shift his collateral and to release securities which are included in his ordinary demand loans (fols. 631-633).

The resources of private capitalists are obviously unequal to such a strain (fols. 966-7). The average daily loans of this kind, made by the appellant alone, amount to at least \$18,000,000 (fols. 580-581) ; those of the Bank of Commerce are about \$15,000,000 (fols. 749-750) ; and those of the Hanover Bank about \$10,000,000 (fol. 653) ; and to all of these millions must be added the millions loaned by the other banks and bankers (fol. 824). One hundred million dollars (\$100,000,000) would probably be a conservative estimate of the amount of such loans every day. To enable this business to be done, the banks in the Wall Street district make what is known as "day" or "clearance" loans ; that is, they extend an accommodation credit in the morning *for this specific purpose and no other* (fols. 485-488, 617-8) ; and it is understood that *no portion of the proceeds of these clearance loans is to be used for any other purpose than to clear securities* (fol. 842). No interest is charged on these loans (fol. 942) ; they are solely for the temporary accommodation of the depositor, while he is meeting his engagements for the day. If this accommodation were not extended, the broker would be unable to perform his contracts, his securities would be sacrificed and his general creditors would ordinarily be left with little or nothing.

This form of business is peculiar to stockbrokers (fols. 617-618), who cannot obtain any other kind of loan without collateral (fols. 642-3, 655, 807-9). It differs from the relations which exist between banks and merchants, as money is advanced on commercial paper without collateral (fol. 809).

Although these loans are nominally made payable on demand, they are paid during the day, as a matter of course, without any demand (fol. 942). As soon as the stock broker begins to make his deliveries, he commences to deposit their proceeds with the bank which has given him the credit (fols. 559-561, 623, 624, 639, 661-662, 702, 759, 795,

796, 845). This was the uniform course of dealing between the defendant and Lathrop, Haskins & Co., and their predecessors.

The business had been conducted in this manner *for many years* (fols. 508, 556, 562-564) and, *during that entire period, a new credit was obtained each day, which was discharged on the same day* (fols. 556-557, 564-565, 572-573, 643-644). In making these clearance loans, the banks thus gave to the brokers an accommodation credit *for a specific purpose* (fol. 842). It would not be practicable for the banks to send out their own clerks to pay for and receive the securities deliverable to the brokers, or to make payments for the purpose of releasing the securities held in loans, as each bank has a large number of such accounts, the defendant alone having about a hundred (fols. 571, 575-580); and each account necessarily involves innumerable items. The banks are consequently forced to entrust the funds to the brokers, who are thus constituted trustees for the purpose of effecting the clearances (fols. 656, 807, 842).

At the opening of business on the morning of January 19, 1910, Lathrop, Haskins & Co. were concededly largely solvent, their assets exceeding their liabilities by \$486,869.57 (fols. 297-9<sub>1</sub>); and there was no intimation of insolvency (fols. 224, 304-5). At that time, they obtained from the City Bank a clearance loan of \$500,000, evidenced by two demand notes, which were offered in evidence by the complainant's counsel (fol. 437). These notes provided that the Bank should have a lien upon "all property of the undersigned *now or hereafter in its possession or under its control*", "with the right, *at any time, to demand additional security*" (fols. 439, 441-2). These notes were in form precisely like those that had been in constant use between the parties for a long time (fol. 450).

Against the credit thus obtained, the firm drew four checks, for the purpose of paying off outstanding secured loans, which were made payable to the following institutions and for the following amounts, respectively:

Liberty National Bank.....	\$100,095.81
Guaranty Trust Co.....	100,011.11
First National Bank.....	200,340.24
Brooklyn Trust Company.....	100,273.58

These checks were certified by the Bank; and, upon payment of the loans, the securities were delivered to Lathrop, Haskins & Co. (fols. 391-4).

This clearance loan had been paid off in the usual course of business during the forenoon, with the exception of about \$117,000 (fol. 590). The suspension of the firm was announced on the Stock Exchange at about noon (fols. 196-201). It was the result of a sudden and violent break in the stock market affecting all securities, but chiefly the capital stock of the Columbus and Hocking Coal and Iron Company (fols. 306-7), in which the firm was largely interested, and in which a pool existed. The break was ascribed to the treachery of the manager of the pool (fols. 491, 597), and was entirely unexpected. Mr. Haskins testified to the easy condition financially of his firm up to the very moment of its failure (fols. 851-856); and it is conceded that when the clearance loan was made by the Bank to the firm on the morning of January 19, 1910, the firm was abundantly solvent, having assets in excess of liabilities to the extent of at least \$400,000 (fols. 294-300); and both parties acted in the utmost good faith in connection with the loan and without a thought or intimation of the possibility of a failure.

Not only did the general usage of business in the case of such loans require the firm to pay off the loan by 3 o'clock; not only did the uniform course of business between the parties, repeated day in and day out for many years, require it (fols. 450, 508, 554-7, 563-4, 572, 643, 910); but, by the express terms of the demand notes, taken each day (fol. 945), the Bank had the right to demand additional security at any time; and it was *expressly* given a lien upon all property then or at any time thereafter in its possession or under its control, and the right, at any time, to demand additional security (fols. 439, 441-2).

The clearance loan of \$500,000 was made at about 10 o'clock (fols. 555, 911). At about noon (fols. 457, 546), Mr. Kilborn, a Vice-President of the Bank, and Mr. Albeck, an Assistant Cashier who had charge of making these clearance loans, went to the office of the firm and asked for payment or for securities to make good the clearance loan (fols. 459, 483-4, 489, 491-2, 604, 608, 920); and, after waiting for an hour or two, during which time the firm conferred with their

counsel, Mr. Henry D. Hotchkiss (fols. 509-11, 547, 549), the complainant in this case, they finally received the securities, with the entire concurrence and approval of Mr. Hotchkiss (fol. 511), not later than 2.30 p. m. (fols. 456-7, 552). When they received the securities, they knew that the firm had suspended on the Stock Exchange but did not know that it was insolvent. *Substantially all of the securities thus received were paid for or liberated from loans by the use of the proceeds of the clearance loan made that morning* (fols. 395-401).

The Special Master, to whom it was referred to take the testimony and report to the Court his opinion, found that, when the securities were delivered, the firm was insolvent and that the representatives of the Bank had reasonable cause to believe that it was intended to give the defendant a preference whereby it would obtain a greater percentage of its debt than other creditors of the same class (fol. 924).

Upon the final hearing before his Honor, Judge HAND, the same conclusion was reached by the Court, by a somewhat different line of reasoning (fols. 1089-1122) (200 Fed., 294); and this was affirmed by the Circuit Court of Appeals, in an opinion by his Honor Judge WARD (pp. 335-341) (201 Fed., 669).

### **Assignment of Errors.**

In the defendant's assignment of errors, the various grounds upon which the Court erroneously relied in reaching the conclusion that the delivery of the securities in question to the defendant constituted an unlawful preference under Section 60b of the Bankruptcy Law, are specified in detail (pp. 343-345).

The particulars in which it is contended that the decree was erroneous may be briefly summarized, as follows :

1. In finding that appellant was in the same class as other creditors and that the effect of the transfer was to enable it to obtain a greater percentage of its debts than other creditors of the same class (Assignments First and Second).

2. In finding that appellant received the securities with knowledge of the insolvency of the bankrupts and

with reasonable cause to believe that the bankrupts intended a preference, and not in the honest belief that it was lawfully entitled to them (Assignments Third, Fourth and Fifth).

3. In not finding that the delivery was made pursuant to a usage or agreement by which the clearance loan was protected by these securities, and in not finding that the appellant was equitably entitled to receive and retain them as against the appellee and all other creditors of the bankrupts (Assignments Sixth, Seventh, Eleventh and Twelfth).

4. In not finding that the appellant became subrogated to the rights of the secured creditors (Assignment Eighth).

5. In confirming the report of the Special Master and affirming the decree of the District Court (Assignments Ninth, Thirteenth, Fourteenth and Fifteenth).

## **P O I N T S .**

### **FIRST.**

#### **Legality presumed.**

It must be presumed that every one has conformed to the law, unless the contrary is affirmatively shown. The law will not presume an agreement or transaction to be illegal, when it is capable of a construction which would make it valid.

Jones on Evidence (2nd ed.), Sec. 85 ;  
*King v. Hawkins*, 10 East., 211 ;  
*Curtis v. Gokey*, 68 N. Y., 300, 304 ;  
*Ormes v. Dauchy*, 82 N. Y., 443.

The law presumes that the payment or securing of a just debt is legal and valid.

*Getts v. Jainesville Grocery Co.*, 163 Fed., 417 ;  
*Re Neill-Pineckney-Maxwell Co.*, 170 Fed., 481, 484 ;  
*Re Leech*, 171 Fed., 622 (C. C. A.).

In *Sexton v. Kessler* (172 Fed., 535), WARD, J., said (p. 537) :

"As the transaction was a perfectly honest one, a construction should be adopted to give it effect, if that is possible."

## **SECOND.**

### **Right to recover preference is exclusively statutory.**

I. The common law favors the diligent creditor; and, at common law, it is entirely proper for a debtor to prefer a particular creditor; and he may go to the extreme extent of conveying all of his property to one creditor, so that the effect of the transfer will be to place his property beyond the reach of other creditors and render their debts uncollectible.

*Tompkins v. Hunter*, 149 N. Y., 117, 121-2;  
*Dodge v. McKechnie*, 156 N. Y., 514, 520;  
*Huntley v. Kingman*, 152 U. S., 527, 532.

II. A trustee in bankruptcy has, therefore, no power to avoid a preference, except on the precise grounds specified in the statute; and, as the right given is in derogation of the common law, it must be strictly pursued.

*Plowden*, Comm., 113;  
*Sutherland*, Stat., Con., Sec. 371;  
*Atkins v. Kinnan*, 20 Wend., 241, 249, 250.

This is in accordance with the familiar principle, that when a remedy is given by statute, it must be strictly followed, inasmuch as the court "is limited in its powers by the statute, under which alone it can act."

*East Tenn. etc. R. Co. v. Southern Tel. Co.*, 112 U. S., 306, 310;  
*Campbellsville Lumber Co. v. Hubbert*, 112 Fed., 718, 724-50 (C. C. A.); affd., 191 U. S., 70.

In New York, the principle has been expressly applied to a case where a common law right to a preference was abrogated.  
*Matter of Bryce*, 16 Daly, 443.

The jurisdiction of the District Courts to entertain a plenary suit in equity, to set aside a preference, is thus exclusively statutory ; and every provision of the statute upon which the right to maintain the suit depends must be pleaded as well as proved.

*Metcalf v. Watertown*, 128 U. S., 586, 588 ;  
*Florida Centl. v. Bell*, 176 U. S., 321, 327 ;  
*North America, etc., Co. v. Morrison*, 178 U. S., 267 ;  
*Riggs v. Cragg*, 89 N. Y., 479.

### **THIRD.**

#### **No depletion of assets.**

I. A transaction which does not have the effect of diminishing the fund that is distributable among the creditors is not repugnant to the statute.

*N. Y. County Bank v. Massey*, 192 U. S., 138, 147 ;  
*National Bank of Newport v. Herkimer Bank*, 225 U. S., 178, 184 ;  
*Gorman v. Littlefield*, 229 U. S., 19, 25 ;  
*Continental etc. Trust Co. v. Chicago Title etc. Co.*, 229 U. S., 435.

1. In *Gorman v. Littlefield*, this Court unanimously reversed the Circuit Court of Appeals for the Second Circuit (also a unanimous decision), in a case where a stock broker had sold the stocks of his customer but where other certificates of stock in the same corporation were found in the possession of the broker, after his failure. This Court recognized that the duty of the broker to use his own funds to keep the amount due to his customer intact could be performed without depleting

the estate and that the general creditors, therefore, could not properly claim that the fund should be used for their benefit.

2. Continental Trust Co. v. Chicago Title Co. was another case of unanimous reversal by this Court.

The bankrupt, Prince, was a member of the Chicago Board of Trade, and had a bank account with the defendant's predecessor. By the rules of the Board of Trade, the parties to a sale could demand 10 per cent. margin; and certain banks, of which the defendant's predecessor was one, were authorized to issue "margin certificates", in which they certified that the member had deposited a certain amount as security on a contract or contracts with another member. These certificates were deposited with the clearing house of the Board, pending the transaction; and the amount of a certificate would become payable to the member to whom it was issued, unless, by his default, the other party to the sale became entitled thereto. The Bank had issued such certificates to Prince for some time prior to February 9, 1905, for which it had been reimbursed by him. On February 10, Prince became financially involved; and the Bank then had reasonable cause to believe that he was insolvent. At that time, Prince owed the Bank \$37,000. On February 14, an officer of the Bank called on Prince, and an arrangement was concluded, by which Anderson, another member of the Board of Trade, agreed to take over all of Prince's open trades; and they were accordingly assigned to Anderson. The next day, Anderson substituted his own securities with the Clearing House on these trades, and the margin certificates belonging to Prince, amounting to \$4,250, were thus released; but, instead of being delivered to Prince, they were handed over to the Bank. Upon receiving the certificates, the Bank applied the money represented by them to the payment of Prince's indebtedness. A petition in Bankruptcy was filed against Prince on the same day. The arrangement for the assignment of the contracts was as favorable to the bankrupt as any which could have been made; since, if

he had been left with them and had been unable to carry them out, the amount represented by the certificates and, possibly more, would have been sacrificed, and a panic on the Board of Trade might have ensued.

The District Court held that the transaction constituted a preference which the Trustee in bankruptcy could avoid. The decree to that effect was unanimously affirmed by the Circuit Court of Appeals (199 Fed., 704), which held, that the deposits made by Prince against the certificates constituted a special trust fund, so that there was no right of set off, and that when the contracts had been taken over, this special fund became the property of Prince and could not be applied to the payment of a particular creditor.

This Court, in reversing the Circuit Court of Appeals, held that the question of set off was not material and that the test to be applied was whether the bankrupt's estate was diminished by the transaction. That diminution of the Bankrupt's estate is the essential element in determining whether a transfer is preferential was laid down in unqualified language in that case (pp. 443-4) :

" It is further evident from the facts stated, that without the co-operation of Anderson & Company, who took the place of Prince upon the Board of Trade, substituted their securities for those of Prince, and carried out his obligations, the certificates would have had no value to the estate. By the arrangement made, Anderson & Company took hold of the situation, and, carrying out the deals upon which Prince was bound, cleared the certificates of any obligation to others, and they thereby became payable to Prince. What was done did not in fact diminish the estate of Prince, otherwise available to the creditors in the bankruptcy administration, for the traders holding them would have had the benefit of the deposits under the terms of the certificates and the rules of the Board of Trade. It, therefore, appears that *this essential element of a preferential transfer* within the meaning of the Bankruptcy Act—*diminution of the bankrupt's estate*—is wanting. The fact that what was done worked to the benefit of the creditor, and, in a

sense gave him a preference, is not enough, unless the estate of the bankrupt was thereby diminished."

In that case, the Bank had no lien or claim of any kind upon the certificates. They were the property of Prince, the bankrupt, and became valuable merely because the contracts had such value that Anderson was willing to take them over and thus release the \$4,250 which Prince had deposited as security for their performance. The Bank was really acting only as a go-between in bringing about the sale of the contracts to Anderson; and the only claim that it had upon Prince in connection with the transaction was apparently one for compensation; and yet, because the net result of the transaction was to leave the estate unimpaired, the fact of such unimpairment was treated as controlling, in considering whether there had been an unlawful preference.

II. In the present case, the Bank stepped into the position of the secured creditors. It made the loan partly for that purpose. So far from depleting the assets of the borrowers, this act on the part of the defendant increased the amount of their available assets, by liberating a margin of 20% to 25%, comprised in the secured loans (fols. 384, 852-854). Had the credit not been given by the defendant, these securities would have been retained by the secured creditors and would probably have been sold at a great sacrifice, in view of the violent break in the stock market, instead of being held until the market conditions improved. The fund was thus used for the benefit of creditors generally and not to their prejudice.

The dealings between a bank and a brokerage firm on any one business day, in connection with making, securing and paying a clearance loan, should be treated as a single transaction; and, since the net result of the transaction between the defendant and Lathrop, Haskins & Co., on January 19, was to increase the firm's assets, it cannot be successfully attacked as a preference.

III. The same principle has been recognized in the case of running accounts, even where the account is not active and

where two payments have been made without any intermediate sale.

*Re Sagor*, 121 Fed., 658 (C. C. A., 2nd Cir.);  
*Jaquith v. Alden*, 189 U. S., 78;  
*Yaple v. Dahl-Milliken Co.*, 193 U. S., 526;  
*Wild v. Provident Trust Co.*, 214 U. S., 292, 296.

In those cases, it was held that payments by the bankrupt, on a running account, during insolvency and within four months of the filing of the petition, were not preferences, where the net result of the transactions between the bankrupt and the creditor was to enrich the former's estate. In *Wild v. Provident Trust Co.*, counsel for the trustee attempted to distinguish the previous decisions, on the ground that, in that case, no sales had been made to the bankrupt since the last payment made by it, and that, therefore, the last payment, at least, must be treated as a preference. The Court, however, in referring to *Jaquith v. Alden*, said (p. 296) :

"But the decision in that case was not rested upon the fact of this slight sale subsequent to the last payment. It was rather put upon the broader principle, that all dealings between the creditor and the bankrupt were after the bankrupt's insolvency, and that their net effect was to enrich the bankrupt's estate by the total sales less the total payments."

The rule laid down in these cases is controlling authority for the application of equitable principles to the determination of the question whether a preference has been given. There is no express authority in the language of the Bankruptcy Act for treating payments on a running account differently from other payments; but the obvious justice of doing so has led the courts to lay down this rule. Although, in these cases, all the transactions, apparently, took place after the insolvency, there is no reason why the same rule should not be applied to running accounts which commence before that time. The justice of treating the dealings between the bank and the brokers on any one day as a single transaction, is certainly as strong as in the case of a running account.

## FOURTH.

### **No other creditors of the same class.**

A payment is objectionable under Section 60 only when it has the effect of enabling one creditor to obtain a greater percentage of his claim than other creditors of the same class.

I. Lathrop, Haskins & Co. had only the one bank account, that with the defendant ; and they obtained no clearance loans from any other bank (fols. 413-14). These transactions, therefore, constituted a class by themselves ; and as there were no other creditors of the same class, there was no violation of the terms of the statute.

*Swartz v. Fourth Natl. Bank, 117 Fed., 1 (C. C. A.) ;*

*Crooks v. The Peoples Nat. Bank, 46 App. Div., 335.*

II. The classification referred to in Section 60a is not the same as that providing for a priority in the payment of debts in Section 64b, as was assumed by the Special Master (fol. 933). The classification in the latter Section includes taxes, expenses and wages ; and the expenses would be incurred only after the filing of the petition, and, therefore, would not be in the class of provable debts at all.

A landlord is a creditor of a different class from other creditors, within the meaning of Section 60a.

*Re Belknap, 129 Fed., 646 ;*

*Re Barrett, 6 Am. Bkpcy. Rep., 199 ;*

but he would not be entitled to priority in the distribution of the assets under Section 64.

The holder of a note, indorsed by third persons, is in a different class from other creditors, under Section 60a.

*Re Harpke, 116 Fed., 295, 297 (C. C. A.).*

Almost any distinction is sufficient to constitute a separate class under Section 60a.

*Re Denning, 114 Fed., 219, 221 ;*

*Gomila v. Wilcombe, 151 Fed., 470 (C. C. A.) ;*

but the classification in Section 64 is definite and fixed.

III. The balance sheet of the firm, after its suspension on January 19, 1910 (fols. 301-3), showed that the total liabilities aggregated \$1,936,035.64, made up as follows :

Due to customers .....	\$747,361.50
" " Stock Exchange members .....	858,813.95
" " banks and trust companies .....	213,693.50
" " defendant .....	116,166.69
	-----
	\$1,936,035.64

The defendant is clearly in a different class from any of these creditors.

1. Customers were those for whom the firm was engaged in buying and selling securities. They were really the principals engaged in the business. They cannot question the acts of their agents in the transaction of the business, especially in view of the fact that those acts were in accordance with long established usage. They have no rights superior to those of their agents, and they are in a class entirely distinct from that of the Bank.

Among these customers were many members of the families of Lathrop, Haskins & Co. (fols. 347, 350), some of whom were infants whose names were evidently used by the members of the firm as a nominal designation for their own operations (fol. 348). Many of the customers were also members of the Hocking pool (fols. 335-6).

2. The members of the New York Stock Exchange are enabled to continue their business through the instrumentality of these clearance loans. The amount owing to them is nearly half the entire amount of all the liabilities. Is it possible that the brokers, to whom these loans are made for a specific purpose, can come forward when one of their number fails and claim that they are in the same class as the clearance banks which extend to them the temporary accommodation, free of charge, and that they can insist on an equal division with the banks of a fund which they bound themselves to treat as a trust fund?

Among the Stock Exchange creditors, it is interesting to note the firm of J. M. Fiske & Co. for \$123,578.79 (fol. 878), who were members of the Hocking pool (fols. 326, 328, 336-7), who failed on the same day as Lathrop, Haskins & Co. (fol. 343) and whose Trustees in bankruptcy are now seeking to set aside a similar transaction with the Mechanics and Metals National Bank. Another of the Hocking pool members was the firm of Day, Adams & Co. (fols. 336-7), with a claim of \$186,162.51 (fol. 881); while Roberts, Hall & Criss, who failed on January 20, 1910 (fol. 315), loom up with a monumental claim of \$517,258.51 (fol. 884), about one-fourth of all the liabilities; and Mr. Criss, of that firm, was the broker on the Stock Exchange who executed the orders of the pool (fols. 337-8). Other pool members were A. J. Elias & Co. (fols. 336-7), with a claim of \$123,017.42 (fol. 869), and Rollins & Co. (fols. 336-7), with a claim of \$123,017.42 (fol. 869).

3. The remaining class, the banks and trust companies, must be assumed to have extended credit to Lathrop, Haskins & Co. in view of the conditions existing in the conduct of their business and in view of the manner in which Lathrop, Haskins & Co. obtained credit to make their daily clearances. It is undisputed that stock brokers are obliged to secure all of their loans, except the clearance loans, with proper collateral (fols. 642-3, 655, 807-9); and this method of borrowing is a matter of such general knowledge that the Court did not require actual proof of the fact. Banks and trust companies lending on collateral are, therefore, in a class by themselves. Moreover, no one knows better than they how the clearances of stock brokers are effected and how the secured loans are paid off and securities substituted through the assistance extended by the clearance banks. Indeed, the business of the other banks and trust companies in secured loans is made possible largely through the daily clearance loans. The secured creditors make their loans on the value of the collateral; but the banks that make the clearance loans do so relying solely upon the good faith of their

borrowers. The former take no appreciable risk, as they always insist upon a margin of 20 to 25 per cent. (fols. 384, 852-4), and can readily protect themselves against the fluctuations of the market; and they do not for a moment consider that they have any interest in the daily clearance loans obtained by their debtors, as they know perfectly well that these loans are accommodation advances for a particular purpose, that they are settled before the close of business every day and that they never show a balance at the close of business. To assert, therefore, that the banks and trust companies which lend their money on collateral are in the same class as a bank that grants a temporary accommodation for clearance purposes, without charge, is to lose sight of all distinctions between different classes of creditors. The record shows that the defendant itself is included among the banks and trust companies, with a claim of \$6100 (fol. 191). No one has ever imagined that this general claim is in the same class as the claim of the Bank growing out of the clearance loan.

## FIFTH.

### No proof that Bankrupts intended to give preference.

Prior to the amendment of 1910, the trustee in bankruptcy was required to prove, in a suit of this kind, that the creditor knew that the bankrupt actually intended to give a preference.

- Hardy v. Gray, 144 Fed., 922 (C. C. A., 1st);  
*Re First Natl. Bank of Louisville*, 155 Fed., 100  
 (C. C. A., 6th);
- Rutland Co. Natl. Bank v. Graves, 156 Fed., 168;
- Tumlin v. Bryan, 165 Fed., 166 (C. C. A., 5th);
- Re Leech*, 171 Fed., 622 (C. C. A., 6th);
- In Re Sayed*, 185 Fed., 962;
- Kimmerle v. Farr, 189 Fed., 295 (C. C. A., 6th);
- Debus v. Yates, 193 Fed., 435.

These decisions were made under the statute as it existed prior to the amendment of 1910. The language at that time was as follows :

SEC. 60 (b.) "If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The Circuit Court of Appeals for the Second Circuit reached a different conclusion, but upon facts which did not require any conclusion to be reached upon this particular point.

*Alexander v. Redmond, 180 Fed. Rep., 192.*

For a full discussion of this point, the Court is respectfully referred to the learned brief for the Appellant, in the case of Mechanics and Metals National Bank v. Ernst (pages 61-64, 80-90), following the case at bar upon the calendar of this Court.

## SIXTH.

### **Defendant did not have reasonable cause to believe it was obtaining a preference.**

Even if the state of mind of the creditor, rather than the bankrupt, was controlling, the evidence shows that the defendant did not believe that a preference was intended and that it had no reasonable cause to entertain such belief.

I. On the question of insolvency, all that was shown was that Mr. Kilborn and Mr. Albeck knew that the firm had suspended, that is, that it had failed to meet its obligations (fols. 472-475, 480-482, 591-594); but there is no evidence that they knew that the assets of the firm would be insufficient to pay its obligations in full. It is true that Mr. Little testified

that he told Mr. Kilborn and Mr. Albeck that the firm was insolvent (fol. 221-22); but he meant by this that they were unable to meet their obligations (fol. 222); and he "hoped they would resume \* \* \* that was the motive that inspired me in directing the return of the securities" (fol. 218). "I always felt they would resume" (fol. 220). Mr. Little was present, apparently, as a customer of the firm, who had been speculating heavily and who had suffered severely by the failure of the firm (fol. 240); but, assuming that he represented the firm, his evidence above shows clearly that the firm considered that their inability to meet their obligations was only temporary.

*Irish v. Citizens' Trust Co., 163 Fed., 880.*

II. The conduct of the defendant's officers in asking for the securities on that day is entirely consistent with the understanding and usage of the business, and is in direct accord with the written contract, that the clearance loans should be taken care of before the close of business hours.

The complainant's own witness, Mr. Little, testified that Mr. Kilborn demanded the securities as a matter of right and said that the Bank was not like an ordinary creditor (fol. 216) and that the obligation of the firm to the Bank was very different from the ordinary obligation (fol. 237) and that it would amount to a conversion if the firm should refuse to deliver the securities to the Bank (fol. 216, 237); and Mr. Kilborn testified that he asked for the securities "to make good their clearance loan" (fol. 459).

All this is certainly not consistent with the idea that the defendant had reasonable cause to believe that it was receiving something to which it was not lawfully entitled. It was merely insisting upon the performance of the contract and understanding between the parties, pursuant to which the loan had been made in the morning. Mr. Hotchkiss, who, as trustee in bankruptcy, is the complainant in the present suit, was also present. He is a lawyer (fol. 229) and was acting in his professional capacity on the day of the suspension (folios 509-11, 547, 549). With reference to the deliveries of the securities to the defendant, he said "he thought it was our exact right to get the securities and for that reason he advised that they be given us" (fol.

511). According to Mr. Albeck, Mr. Hotchkiss recognized the fact that the obligation of the defendant was one of those that "should be taken care of" (fol 550). Mr. Hotchkiss would have been guilty of highly reprehensible conduct if he had advised an act which was unlawful and expressly prohibited by statute. It will be presumed that he undoubtedly acted in good faith, and, therefore, that there was no intention on the part of the firm to give an unlawful preference,

What the Circuit Court of Appeals said in the Kessler case is very much in point (172 Fed., 535, 545) :

"Finally, I think it a serious question whether a mortgagee or pledgee taking possession of property in pursuance and in the enforcement of a pre-existing right of long standing, can properly be said to have reasonable cause to believe that the mortgagor, in surrendering possession, is intending to give him a preference. He takes possession in his own right of that which he looks upon as his own special property. Instead of regarding the transaction as a preference, he would, as suggested in *Thompson v. Fairbanks*, 196 U. S., 516, rather take it as a recognition of his right under his mortgage or pledge. See also *Humphrey v. Tatman*, 198 U. S., 93."

## **SEVENTH.**

### **Subrogation.**

The clearance loan of \$500,000 made by the defendant to Lathrop, Haskins & Co. was applied by them to taking up secured loans (fol. 394). They had four checks certified against the account, payable to banks or trust companies, for the amount of the secured loans held by such institutions, respectively, aggregating \$500,720.74 (fol. 392); and, upon the payment of the loans, they received the securities (fol. 394). Substantially all of the securities delivered by them that day to the appellant were those obtained directly by the use of the

appellant's money (fols. 395-401). The appellant was, consequently, subrogated to the rights of the secured creditors, including the right to the securities released through the use of its money.

I. The tendency of the courts has been to extend the doctrine of subrogation to every possible case for the protection of one who has advanced money which is used in the discharge of an obligation carrying with it some form of security. Formerly, the courts declined to recognize this right unless the money was paid under a definite agreement, or for the purpose of protecting a junior interest in the security held by the principal creditor; but that limitation is no longer recognized, because the true basis of the doctrine is "the natural justice of placing the burden where it ought to rest".

*Matthews v. Fidelity Title etc. Co.*, 52 Fed., 687, 689.

The courts, and especially those of New York, now apply the doctrine "in every instance in which one party pays a debt for which another party is primarily liable, and which, in equity and good conscience, should have been discharged by the latter."

*Stevens v. King*, 84 Me., 291 (PETERS, Ch. J.) ;  
quoted with approval in  
*Dunlop v. Adams*, 174 N. Y., 411, 416 ;  
*Atlantic Trust Co. v. Kinderhook, etc. R. Co.*, 17  
App. Div., 212 ;  
*Louis v. Bauer*, 33 App. Div., 287, 293 ;  
*Peters v. Meyer*, 72 App. Div., 585, 587 ;  
*Gans v. Thieme*, 93 N. Y., 225 ;  
*Pease v. Egan*, 131 N. Y., 262, 273 ;  
*Moorehouse v. Bklyn. Heights R. Co.*, 185 N. Y.,  
520, 524 ;  
*Title Guarantee & Tr. Co. v. Haven*, 196 N. Y., 487 ;  
*Lidderdale's Executors v. Robinson's Admr.*, 2  
*Brock.*, 159, 168.

In the case last cited, MARSHALL, Ch. J., said (p. 168) :

"Where a person has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible shall be clothed with the legal garb with which the contract

he has discharged was invested and he shall be substituted to every equitable intent and purpose in the place of the creditor whose claim he has discharged."

In *Title Guarantee and Trust Company v. Haven* (*supra*), the Court went to the extent of saying that an innocent third party, under no obligation to pay municipal assessments upon the real property of another, was subrogated to the rights of the municipality, on having cashed a forged check, the proceeds of which were applied to the payment of such assessments.

The only exception to the liberal rule recognized by the New York courts is that it will not be applied to defeat the superior or equal equities of third persons.

4 Pom. Eq. Juris. (3d Ed.), Sec. 1419, *note* ;  
*Union Tr. Co. v. Monticello, etc. R. Co.*, 63 N. Y., 311, 314.

## II. The Bankruptcy Courts should apply the doctrine recognized in the State courts.

*Hewitt v. Berlin Machine Works*, 194 U. S., 296 ;  
*Thompson v. Fairbanks*, 196 U. S., 516 ;  
*Humphrey v. Tatman*, 198 U. S., 93.

In *Sabin v. Camp*, 98 Fed., 974, the Court said (p. 975) :

"Camp furnished the money out of which the property which is the subject of the sale to him was created. He had good right, in equity and in law, to make provision for the security of the money so advanced, and the property purchased by his money is a legitimate security and one frequently employed. *There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced.* This was what the parties intended at the time and to this, as already stated, there is and can be no objection in law or in morals. And when at a later date but still prior to the filing of the petition in bankruptcy, Camp exercised his rights under this valid and equitable arrangement to possess himself of the property and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the Bankruptcy Law."

This language was quoted with approval by this Court, in *Thompson v. Fairbanks* (196 U. S., 516, 524).

III. It was assumed, both by the Special Master and by Judge HAND, that the Bank was merely a volunteer, and that, therefore, the doctrine of subrogation could not be applied, for the reason that it is applicable only where the person advancing the money does so to protect his own interest in the property, or pursuant to agreement, or at the request of the debtor. The Special Master was clearly in error, in holding that it was the intention of the parties that the clearance loan should be applied to the payment of *any* indebtedness of the firm (fol. 979), in view of the undisputed evidence contained in the stipulation, that it was understood that *no portion of the proceeds of the loan was to be used "for any purpose, other than to clear securities"* (fol. 842). He was also in error in supposing that there could be no subrogation unless the Bank knew exactly what secured loans were to be paid off (fol. 980), and not even then, unless there was an express agreement that the Bank should be subrogated (fol. 984). The Bank did, however, have exact knowledge as to the loans in the present case, because it certified the checks that were made payable to the institutions, respectively, which held the secured loans (fol. 392). *It advanced the money for the express purpose, among other things, of taking up any secured loans of the firm* (fol. 841); and an agreement that it should be subrogated to the rights of the borrower was not necessary. Equity takes care of that, where there are no other creditors with superior claims upon the property. The Bank was not a volunteer; because it advanced the money at the request of the firm, for the very purpose of enabling it to take care of its secured loans. Courts of equity will not permit technicalities or even serious obstacles to stand in the way of the enforcement of the principle of subrogation; and they will, if necessary to do justice, even revive a mortgage that has been discharged of record.

Peters v. Meyer, 72 App. Div., 585;

Gans v. Thieme, 93 N. Y., 225;

Pease v. Egan, 131 N. Y., 262;

Cobb v. Dyer, 69 Me., 494.

Judge HAND thought that the question of subrogation was "easily disposed of," because the funds that were used to

pay off the secured loans did not belong to the Bank but to the firm (fol. 1116-17). He overlooked the undisputed fact, that the Bank advanced the funds for the express purpose, among other things, of clearing these loans, and not as a general loan to Lathrop, Haskins & Co. It is not necessary that the person to be subrogated should pay the creditor directly. It is sufficient if he advances the money for the purpose of enabling the debtor to pay the debt.

*Tradesmen's Building Assn. v. Thompson*, 32 N. J. Eq., 133;

*MERCHANTS' BANK v. TILLMAN*, 106 Ga., 55 ;  
*Sgobe v. Cappadonia*, 8 App. Div., 303 ;  
*Peters v. Meyer*, 72 App. Div., 585.

On the morning of January 19, Lathrop, Haskins & Co. obtained a somewhat larger accommodation than usual, on account of their heavier commitments (fol. 566) ; and this is apparent in the four checks, aggregating about \$500,000, which the defendant certified, after making the clearance loan (fol. 392). The effect was thus precisely the same as if Lathrop, Haskins & Co. had expressly requested the defendant to furnish it with the funds necessary to take up these particular loans, and as if the defendant had thereupon complied with the request, in accordance with its exact terms.

IV. It is perfectly obvious that, if the defendant had not made the clearance loan on January 19, the securities in these four large loans would have been sacrificed. Assuming that they were margined to the extent of only 20%, an equity of at least \$100,000 was saved to the estate by reason of the defendant's assistance ; and had the loans been called and the securities sold on the panicky market which then prevailed, a large deficiency claim against the estate in favor of the secured creditors would doubtless have resulted. Why should the customers of the firm, who were speculating on narrow margins, or the stock brokers, whose continuance in business was dependent upon their ability to obtain these clearance loans, or the banks and trust companies, which exacted what they regarded as ample security to protect their loans, be permitted to question the right of the defendant to the salvage that was

obtained solely by reason of the defendant's coming to the aid of the firm and preventing the sacrifice of its assets?

V. This important doctrine, whose true basis is "the natural justice of placing the burden where it ought to rest," was apparently not even considered in the Court below.

## EIGHTH.

### **The proceeds of the loan constituted a trust fund.**

I. By the terms of the contract and the understanding between the parties, Lathrop, Haskins & Co. were obliged to apply the proceeds of the clearance loan to the clearance of their securities (fol. 842). In other words, they received a fund for a particular purpose ; and they were required to account for the whole of this fund by three o'clock. As they received the proceeds of securities which they delivered from time to time, they deposited them with the Bank ; and, at the time the securities in question were received by the Bank, they had already deposited a sufficient amount to liquidate more than three-quarters of the clearance loan. In fully performing their contract, therefore, they were merely doing what a court of equity would have required them to do. "The exercise of a pre-existing right, well founded in equity, is not a preference."

Sexton v. Kessler, 172 Fed., 535, 544.

II. No creditor will be allowed to complain in a court of equity of an act on the part of the debtor which he was, in good conscience, bound to perform ; and that is true of all creditors who were presumably familiar with the manner in which the bankrupt's business was conducted.

III. In the earlier cases, it was assumed that a trustee in bankruptcy could set aside a delivery of property to a creditor

within the four months period, unless the creditor could establish a lien upon the property ; and the courts were at great pains to find some basis for a lien, even if it were only an equitable one. This was noticeable as recently as when the Kessler case was before the Circuit Court of Appeals (172 Fed., 535) ; and Judge WARD based his conclusion in that case, upon the assumption of a declaration of trust, while Judge NOYES, with whom Chief Judge LACOMBE concurred, preferred to treat the transaction as either a mortgage or pledge, which was invalid under the law of New York as against attachment or execution creditors but valid as against all other creditors, in case possession was obtained (*Parshall v. Eggert*, 54 N. Y., 18 ; *Matthews v. Hardt*, 79 App. Div., 570, 575), and valid as against the trustee in bankruptcy, if possession was obtained before the filing of the petition.

When the Kessler case reached this Court (225 U. S., 90), the theory of an actual trust or lien was disregarded, and the decision was based on the broadest possible consideration of all the equities ; and the Court was led to recognize the right of the creditor to the securities in question, because there was nothing in the situation which prevented the recognition of that right as against the claim of the Trustee (p. 97). The Court said (pp. 98-9) that to call the right an equitable lien did not advance the discussion, because the right depended upon whether, upon the facts of the case, the party claiming the right had a priority which would be recognized, in the absence of any local or general law that would take from the transaction the effect it was intended to produce. The decision was unanimous ; and it was made possible by the previous decision in the case of *Hurley v. Atchison, Topeka & Santa Fe Ry. Co.* (213 U. S., 126), upon which the Court expressly relied.

In the latter case, the Atchison, Topeka and Santa Fe Railway Company had an agreement with a coal company for the supply of the coal required for the use of the Railway Company. Each month, it paid for the coal which had been delivered during the preceding month. The Coal Company became involved financially, and, to keep it going and enable it to pay its workmen, the railway Company made advances, which were to be credited on account of coal to be sub-

sequently mined and delivered. In the end, the Coal Company became bankrupt, owing the Railway Company about \$57,000 for moneys thus advanced. In an application in the bankruptcy proceedings, the Railway Company sought to compel the receiver to mine and deliver coal to the amount due to it. The application was denied in the lower courts, on the ground that the relief prayed for would constitute an unlawful preference ; but both the Circuit Court of Appeals and this Court held that it should be granted. The unusual significance of the decision is in the fact that the equitable right was recognized where there was no lien, and not even an agreement for a lien, but merely because, owing to the understanding between the parties, it would have been inequitable not to place the Railway Company in the position which the parties *intended* that it should occupy. Upon this point this Court said (p. 132) :

" To ignore this element and make the bankruptcy proceedings operate to discharge this obligation of the coal company, and leave the transaction as one of an independent loan of money to the coal company, would result in destroying the full equitable obligations of the coal company, and placing the parties, in their relations to each other, on an entirely different basis from what had been contemplated by them when they entered into this original arrangement."

There was apparently an insurmountable obstacle to equitable relief in that case, because there was no contract which a court of equity could have enforced ; but this Court overcame that, by saying that the bankruptcy courts could recognize and enforce the equitable principle even if an ordinary court of equity could not do so ; and it quoted, with approval (p. 132), what the Circuit Court of Appeals had previously quoted from *In re Chase* (124 Fed., 753, 755) :

" It is settled, that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant."

This general equitable principle was extended by this Court in the Hurley case further than it had ever been before ; and as already shown, it was still further extended and applied in the Kessler case ; so that, as the law now stands, where the transaction is valid under the State law, as between the parties, and could not have been attacked by the other creditors, the trustee in bankruptcy will not be permitted to question it.

IV. At the time that Judge HAND made his decision in the present case, the Kessler case had not been decided by this Court. He attempted to find a definite ground for the decision in the Hurley case, in the fact that the money which the Railway Company advanced was the purchase price of a quantity of coal actually in existence, though not yet mined, and that the Company thus acquired "a specific interest in the *res*" (fols. 1117-8). That is a theory which had not occurred to this Court ; and it will not bear inspection. If one person agrees to sell a piece of property to another, and induces the purchaser to pay the purchase price in advance of delivery or the transfer of title, and if the seller then fails to perform the contract, the purchaser does *not* acquire "a specific interest" in the property. He has only a claim for damages resulting from the breach of the contract.

35 Cyc., 612 ;

Williston on Sales, Sec. 598 ;

Bennett's Benjamin on Sales, (7th Ed.) Sec. 870 ;

Kerr v. Henderson, 62 N. J. Law, 724 ;

Brady v. Cassidy, 104 N. Y., 147, 154.

In the lower Court, counsel for the complainant attempted to avoid the effect of the Hurley case, on the ground that the lease of the coal property had been made to the bankrupt's assignor for the purpose of supplying the coal to the railroad company ; but this Court declined to base its decision on that ground, although it had been referred to in the lower court.

V. The equity in the Hurley case was far less convincing than that which is so obvious in the case at bar. The contract which was there entered into had actually been broken

before the bankruptcy, and the creditor had not attempted to take any of the coal into his possession ; while, in the present case, the securities were obtained before the petition in bankruptcy was filed and under such circumstances that no creditor could object to the transaction under the law of New York. Nor was the money advanced in the Hurley case used in acquiring the coal, while, in the present case, it was actually used in obtaining the securities in the secured loans. In the Hurley case, the money was advanced merely to keep the coal company going and to enable it to meet its pay rolls. Moreover, in that case, the transaction was one solely between the bankrupt and the particular creditor. None of the other creditors knew anything about the arrangement and did not extend their credit with knowledge of the uniform course of business which existed here.

The loan of the City Bank to Lathrop, Haskins & Co., on the morning of January 19, was not an isolated transaction ; it was not an ordinary demand loan to be paid on demand, with interest ; it was not an unsecured loan for the day, payable with or without interest ; but it was the last of thousands of similar daily *accommodation* transactions, all of precisely the same character, made for a specific purpose, without compensation, to enable a solvent customer to protect his credit and meet his obligations. It was in reality made for the special benefit of the creditors of the firm and to enable those creditors to receive what was due to them from the firm. The assets of the firm, at the close of business each day, were, therefore, only those which were left after they had accounted for the funds which they had received in trust for the specific purpose of their clearances. Thus, there was a trust relation existing between the Bank and the firm, which no court of equity should ignore, especially a court of bankruptcy, whose equitable powers, as this Court said in the Hurley case, are even broader than those of a court of chancery.

VI. A case somewhat similar to the Hurley case was decided by the Circuit Court of Appeals, Fourth Circuit, in Mills v. Virginia-Carolina Lumber Co. (164 Fed., 168), where the defendant had contracted to purchase the entire output of the debtor's planing

mill, and advanced \$950 on account. Just before the bankruptcy, the defendant insisted that the bankrupt should deliver to it \$1,000 worth of lumber then in the mill yard. Held, that this did not constitute a preference.

VII. In the case at bar, there was a contract continuing throughout the entire business day, that is, until three o'clock ; and the petition in bankruptcy was not filed until after four o'clock (fol. 85). Clearly, as to all creditors of the bankrupt who did not acquire a specific lien upon the securities, the bankrupts were in honor bound to account for the proceeds of the loans which were made to them that morning for a specific purpose.

What the Bank did in the present case is very similar to what the accommodation maker of a note does where he executes the note to the payee and gives it to him for a specific purpose. It would be a distinct breach of faith on the part of the person receiving such accommodation to apply the proceeds of the note to any other purpose than that specified ; and, in case of a diversion, the accommodation maker would have the right to follow the proceeds, as against other creditors of the payee ; and if the payee became bankrupt after receiving the proceeds of the note, but before applying them, the accommodation maker would clearly have a right to such proceeds superior to that of the general creditors.

If, instead of paying their clearance obligations with the proceeds of the loan made to them on January 19, Lathrop, Haskins & Co. had drawn out in cash \$117,000, which later they delivered to the officers of the Bank instead of the securities in controversy, is it not certain that the Court would say that such delivery they were in good faith bound to make and, therefore, that no general creditor or the trustee in bankruptcy could complain ?

VIII. There is a special reason in the present case for applying the very broad equitable principle which was recognized in the Hurley and Kessler cases, and that is in the fact that all the creditors of the bankrupts were either customers, members of their families, stock exchange houses, or bankers and trust companies, every one of whom must have

been perfectly familiar with the manner in which this business was transacted and every one of whom must have conducted his own business with the firm in conformity with this long-continued usage. No matter what the form of the obligation given to the Bank, whether a demand note or no note, the clearance loan is paid off or secured before the close of the day without any demand (fol. 942). The very variety of the form of the obligation accentuates the definite and uniform nature of the usage. For, although no two forms of instruments are the same, the method of transacting the business is identical in every case. Every business is necessarily governed by the general usages which are recognized among those who are engaged in it. "A general custom is the common law itself, or a part of it"; and even written contracts will yield to such custom, as in the case of days of grace for negotiable instruments.

Walls v. Bailey, 49 N. Y., 464, 471.

"The courts must take into account, in all such cases, the customs of trade."

Elkus on Secret Liens, 8<sup>th</sup>, Sec. 150.

What general usage recognizes as proper in the ordinary conduct of business will not be held by the courts to be improper, in the absence of some express statutory provision to the contrary. The usage in the present case was not proved for the purpose of contradicting the terms of a written agreement between the parties, but merely for the purpose of showing that every one interested in the stock exchange business necessarily makes his contracts with reference to the manner in which that business is habitually conducted. Whether or not, therefore, the usage varied the terms of the formal agreement between the two parties to it is of no consequence. As a matter of fact, it did not do so; because, in demanding payment of the loan, or additional security, the officers of the Bank were only doing what the contract expressly provided for (fols. 438, 443). The usage was proved for the purpose of showing that the act in question was not only proper as between the parties but also as affecting third persons who were familiar with the nature of these clearance loans and who gave credit to the stock exchange firm with full knowledge of that

fact and of the manner in which the stock exchange business was transacted.

Counsel for the appellee has laid emphasis on the fact that the proceeds of the clearance loan were placed to the credit of the borrowers in their general deposit account and that there was thus a mingling of credits ; but that made no difference in the equities.

*Fourth Street Bank v. Yardley*, 165 U. S., 634 ; and it was well understood that no part of the deposit account represented by the clearance loan was to be used for any except clearance purposes (fol. 842).

There was thus a special fund held by the bankrupts for a specific purpose, to be used in protecting and enhancing the value of the general assets, and having, consequently, such character that no general creditor could claim any right to share in it.

*Gorman v. Littlefield*, 229 U. S., 19, 25.

## NINTH.

### Opinions below.

I. Some comment has already been made upon the views expressed by the Special Master and by Judge HAND. The opinions written by them make it very clear that their conclusions were largely the result of adopting the contention of complainant's counsel, that the Bank was not entitled to retain the securities unless it showed an actual lien upon them or an agreement for a lien (fols. 985, 999 ; 1093-1108).

They also refused to recognize any right in the Bank to any of the securities based upon the doctrine of subrogation, or upon the fact that the act of the Bank resulted in adding to the value of the estate and not in depleting it, or upon the fact that there was not sufficient evidence to show that the officers of the Bank, in taking the stocks, did so with the intention of gaining an unlawful preference over other creditors ; and both the Special Master and the District Judge entirely

misapprehended the effect of the usage in such cases, and virtually held that no usage had been shown, because it had not been established that stock brokers were in the habit of delivering securities which they had cleared, to their clearance banks, inasmuch as such loans had always been paid, with two exceptions (fol. 960). While refusing to consider the uniform manner in which this business had been conducted, the Special Master expressly recognized that stock brokers could not possibly conduct their business without receiving the financial assistance furnished by these clearance loans (fols. 964-8).

II. The decision of the Circuit Court of Appeals was based upon the assumption that the Bank claimed an equitable lien on the securities (p. 338), and that, as no such lien was shown to exist, it had no right to retain the securities as against the general creditors. The appellant did not, in the lower Court, advance any such contention. It does not assert any right in the securities by reason of a lien, but by reason of its superior equities and the fact that it obtained possession of the securities before the petition in bankruptcy was filed, at a time when the other creditors had no standing to object, under the State law, to the delivery of the securities, and when the brokers were morally and legally bound to deliver the securities for the purpose of fulfilling their contract and accounting for property which they had received in trust for a particular purpose.

The Circuit Court of Appeals gave no consideration to the fact that the Bank was in a class by itself; it ignored the controlling fact that, as the result of the transaction, the bankrupt estate was not impaired, but was actually enriched; it gave no consideration to the application of the doctrine of subrogation; and it overlooked the fact that there was no evidence showing that the Bank had reasonable cause to believe that it was intended to give it a preference, and it assumed (pp. 337-8) that if the Bank had reasonable cause to believe that the brokers were *insolvent* at the time of the transfer, that would be controlling. In this, the Court was clearly in error, as intention to prefer, and not insolvency, is the test. While quoting the terms of the stipulation (p. 339), which provided that it was the understanding "that no portion of the proceeds of

the day or clearance loans was used for any purpose other than to clear securities ", it failed to give any effect to this understanding, and assumed that the loan was made without any restriction as to the manner of its application, although it expressly recognized (p. 339) that "as soon as checks were received by him from the sale of securities cleared by the proceeds of the day or clearance loan, or as soon as moneys were received by the broker from new loans made with the securities cleared by the day or clearance loan, the checks or moneys resulting therefrom were promptly deposited with the Bank during the day, as soon as or within a reasonable time after the same were received ". The Court further recognized (p. 340) that "it was abundantly established that the brokers do repay banks for the clearance loan on the same day and generally with the proceeds of the released securities or of substituted securities and that *it is understood or expected that this shall be done \* \* \* It (the business) could hardly be done, and certainly could not be continued in any other way*". In other words, the business was such that it could not be continued without this temporary use of the funds of the banks. The transaction is clearly a continuing one from the time the loan is made at ten o'clock in the morning until it is repaid, in full or in part and secured as to the remainder, at three o'clock in the afternoon. At all times up to three o'clock, the brokers were bound to account for the entire fund entrusted to them for clearance purposes ; and their creditors and customers had no interest in the fund which enabled them to interfere with the performance of the contract.

The lower Court (p. 338) conceded that if the contract had required the broker to use the proceeds of the loan solely for the purpose of releasing securities, the loan and repayment would constitute a single transaction. That is undoubtedly true ; but that is because, in such case, there would have been a trust, to the enforcement of which the general creditors could not object. But it is expressly conceded that no portion of the proceeds of the clearance loan could be used for any purpose other than to clear securities (p. 339) ; so that the principle applicable is precisely the same.

No reference is made in the opinion of the Court to the analogy of running accounts ; and the decision was based on

the narrowest possible ground, that no technical lien upon the securities had been shown.

The notion entertained by the Circuit Court of Appeals (p. 338), that a loan made to obtain the release of securities would be protected as against the general creditors only if "used specifically" and if the securities thus released or their proceeds were immediately turned over to the lender, is an erroneous one, as was pointed out by this Court in *Gorman v. Littlefield* (229 U. S., 19), where the Court, referring to the obligation of a stock broker to his customer, said (p. 25) :

" Furthermore, it was the right and duty of the broker, if he sold the certificates, to use his own funds to keep the amount good, and this he could do without depleting his estate to the detriment of other creditors who had no property rights in the certificates held for particular customers. *No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner or the application to the general estate of property which never rightfully belonged to the bankrupt.*"

## TENTH.

**The decree of the lower Court should be reversed, and judgment should be directed in favor of the defendant, dismissing the bill of complaint upon the merits.**

Washington, October, 1913.

JOHN A. GARVER,  
Solicitor and Counsel for Appellant.

7

Office Supreme Court, U. S.  
FILED.

OCT 17 1913

JAMES H. McKENNEY,

Clerk

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# Supreme Court of the United States.

OCTOBER TERM, 1913, No. 460.

(Originally No. 975, October Term, 1912.)

HENRY D. HOTCHKISS, as Trustee in Bankruptcy of  
Henry S. Haskins and others,

*Appellant,*  
*against*

THE NATIONAL CITY BANK OF NEW YORK,

*Appellee.*

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## BRIEF FOR APPELLEE.

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JOHN A. GARVER,

*Solicitor and Counsel for Appellee.*

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C. G. BURGOYNE, 72 to 78 Spring Street, New York.

# Supreme Court of the United States.

OCTOBER TERM, 1913. No. 460.

(Originally No. 975, October Term, 1912.)

HENRY D. HOTCHKISS, as Trustee in  
Bankruptcy of Henry S. Haskins,  
Henry Leverich, individually,  
and Fannie G. Lathrop, special  
partner, and as co-partners  
trading under the firm name of  
Lathrop, Haskins & Co.,

*Appellant,*

Brief for  
Appellee.

AGAINST

THE NATIONAL CITY BANK OF NEW  
YORK,

*Appellee.*

## Statement.

Appeal by the complainant from so much of a decree of the United States Circuit Court of Appeals for the Second Circuit as affirmed a portion of a final decree of the District Court of the United States, for the Southern District of New York. The portion of the final decree objected to by the complainant directed the return of certain securities by the defendant to the complainant, without requiring the defendant to pay, in addition, a sum representing the depreciation in the

market value of the securities between January 19, 1910, the date when they were received by the defendant, and April 11, 1912, the date of the entry of the final decree.

On January 15, 1912, an interlocutory decree was entered in favor of the complainant, setting aside, under Section 60 of the Bankruptcy Law, a transfer of securities delivered by the bankrupts to the defendant on January 19, 1910 (fols. 1125-35). It was referred to a Special Master, to take and state the account.

The complainant endeavored to surcharge the account with the amount that the securities had declined subsequent to their delivery (fols. 1157-64). Upon the hearing before the Special Master, it was shown that the Receiver in Bankruptcy (Mr. Hotchkiss, who was afterwards appointed Trustee), had, on January 20, 1910 (the day after the securities were received by the Bank), directed the defendant "not to sell or otherwise dispose of any of the collateral" held by it (fols. 1168-9).

On March 18, 1910, the Receiver again wrote a letter to the Bank, containing the following statement (fols. 1199-1200) :

"I think your suggestion to Mr. Barnaby, that you be permitted to use your own good judgment as to when you shall liquidate the securities held by you for account of collateral loans to Messrs. Lathrop, Haskins & Co., is a very good one, and I thank you for making it.

"With respect to the securities delivered to you upon the 19th of January, and which were the subject of a recent demand on my part, I think it might *also* be well to get the benefit of the most advantageous market. But this, perhaps, ought to be covered by a stipulation approved by your attorneys. I would suggest reference of the matter to them, to the end that we may arrange a course for the best interest of all concerned."

The Bank then suggested that Mr. Hotchkiss should prepare a form of stipulation that would be satisfac-

tory to him (fols. 1203-4). The stipulation was thereupon prepared by the Receiver's counsel (fols. 1206-7); and, on April 5, 1910, it was signed, without change. It contained the following provision (fol. 1189) :

"It is hereby stipulated as follows : That the said securities appearing in Exhibit A may be sold by the National City Bank, at the best price obtainable, *at such times as may seem best to the officers of the said National City Bank.*"

It was further provided that the rights of the parties should not be affected by a sale of the securities, but that the proceeds should stand in their place (fol. 1191).

This stipulation was duly approved by the Court (fol. 1196).

The Special Master refused to hold the defendant liable for the decline in the market value of the securities, and overruled the objections filed to the account (fols. 1213-1277); and, upon a motion by the complainant to disallow his report and for judgment accordingly, the report was confirmed by his Honor, Judge HAND (fols. 1259-67); and the final decree was thereupon entered (fols. 1269, 1281), which was affirmed by the Circuit Court of Appeals (p. 342).

## P O I N T S .

### FIRST.

If the final decree should be reversed upon the defendant's appeal now pending in this Court (No. 459, October Term, 1913), the complainant's appeal from a portion of the decree would, of course, fall.

**SECOND.**

The conduct of the parties and the terms of the stipulation make it clear, beyond the possibility of a doubt, that the sale of the securities was left entirely to the judgment and discretion of the Bank; and its good faith in not selling the securities is not questioned. It is evident that the complainant was unwilling to direct the securities to be sold, or even to recommend that course. He, very properly, preferred to rely upon the experience and judgment of the officers of the Bank, who had a more direct personal interest than the Receiver in realizing the highest price for the securities. It was, therefore, stipulated that they *might* be sold, "at the best price obtainable, at such times as might seem best to the officers of the said National City Bank (fol. 1189)."

Is there the slightest ambiguity in this language? Judge HAND thought that the matter could not have been expressed more plainly (fols. 1261-2). But even if there were any ambiguity in the language, it would have to be construed most strongly against the complainant, whose counsel drafted the instrument.

Nothing could be added, except by way of circumlocution, to the very clear exposition of the subject contained in Judge HAND's opinion (fols. 1260-7).

The inequitable character of the appellant's claim is glaringly obvious in the contention (Assignment of Errors, No. 4, p. 348) that the market value of the securities on January 19, 1910, should be taken, although, on the very next day, the complainant positively directed the Bank not to dispose of the securities (fols. 1168-9).

**THIRD.**

**The portion of the decree appealed from should be affirmed, unless the decree, as a whole, should be reversed under the defendant's appeal.**

Washington, October, 1913.

JOHN A. GARVER,  
Solicitor and Counsel for Appellee,  
55 Wall Street,  
New York City.

Office Supreme Court, U. S.  
FILED.

APR 1 1913

JAMES H. MCKENNEY,

Clerk

Supreme Court of the United States.

OCTOBER TERM, 1912.

~~No. 974 and 975.~~

HENRY D. HOTCHKISS, as Trustee  
in Bankruptcy of Henry S.  
Haskins, Henry Leverich and  
Fanny G. Lathrop, individually  
and as copartners under the firm  
name of Lathrop, Haskins &  
Company,

Complainant, Appellee and  
Appellant,

*against*

NATIONAL CITY BANK,  
Defendant, Appellant and  
Appellee.

450 v 460

Sirs.—Please take notice that a motion will be made, for the reasons hereto annexed, before the United States Supreme Court, at a Session thereof to be held at the Capitol, in the City of Washington, D. C., on Monday, the 7th day of April, 1913, at 12 o'clock noon, or as soon thereafter as counsel can be heard, for a rule or order advancing this

cause and setting it down for hearing and argument on a day to be fixed by the Court.

Dated New York, March 28th, 1913.

Yours, &c.,

ABRAM I. ELKUS & WILLIAM A. BARBER,  
Attorneys for Complainant,  
Appellee and Appellant.  
Office & Post Office Address,  
No. 170 Broadway,  
Borough of Manhattan.  
City of New York.

To. Messrs. SHEARMAN & STERLING,  
No. 55 Wall Street,  
New York City.  
Attorneys for Defendant,  
Appellant and Appellee.

## SUPREME COURT OF THE UNITED STATES.

HENRY D. HOTCHKISS, as Trustee  
in Bankruptcy of Henry S.  
Haskins, Henry Leverich and  
Fanny G. Lathrop, individually  
and as copartners under the  
firm name of Lathrop, Haskins  
& Company,

Complainant, Appellee and  
Appellant,

*against*

NATIONAL CITY BANK,  
Defendant, Appellant and  
Appellee.

Petition.

New comes HENRY D. HOTCHKISS, Trustee in  
Bankruptcy of the above-named Bankrupts, the  
complainant, appellee and appellant of record  
herein, by ABRAM I. ELKUS and WILLIAM A.  
BARBER, his counsel, and moves this Honorable  
Court to advance the above-entitled cause upon  
the calendar and to set the same down for argu-  
ment for a day certain, because of the existence  
of certain special and peculiar circumstances, as  
follows :

*First.*—Complainant is the sole Trustee in Bank-  
ruptcy of the above-named Bankrupts, against  
whom a petition in involuntary bankruptcy was  
filed on January 19th, 1910. Complainant was  
thereupon appointed Receiver in Bankruptcy of  
said Bankrupts and continued to act as such until  
April 17, 1910, when he was duly elected Trustee  
in Bankruptcy of said Bankrupts, in which capacity  
he has ever since continued to act.

*Second.*—The above-entitled cause was brought to set aside the transfer of certain securities by said bankrupts to the defendant on the ground that such act was a preferential transfer. Decision was rendered in favor of complainant in the United States District Court for the Southern District of New York, which decision was thereafter affirmed by the United States Circuit Court of Appeals for the Second Circuit on or about the 11th day of April, 1912. From this decision cross-appeals have been taken to this Court, defendant having appealed from the decision as a whole and complainant from certain minor provisions thereof. These appeals are now pending and are Nos. 974 and 975 upon the October-1912 calendar of this Court. These appeals will not be reached for argument in their regular course for at least two years and possibly not for a longer period.

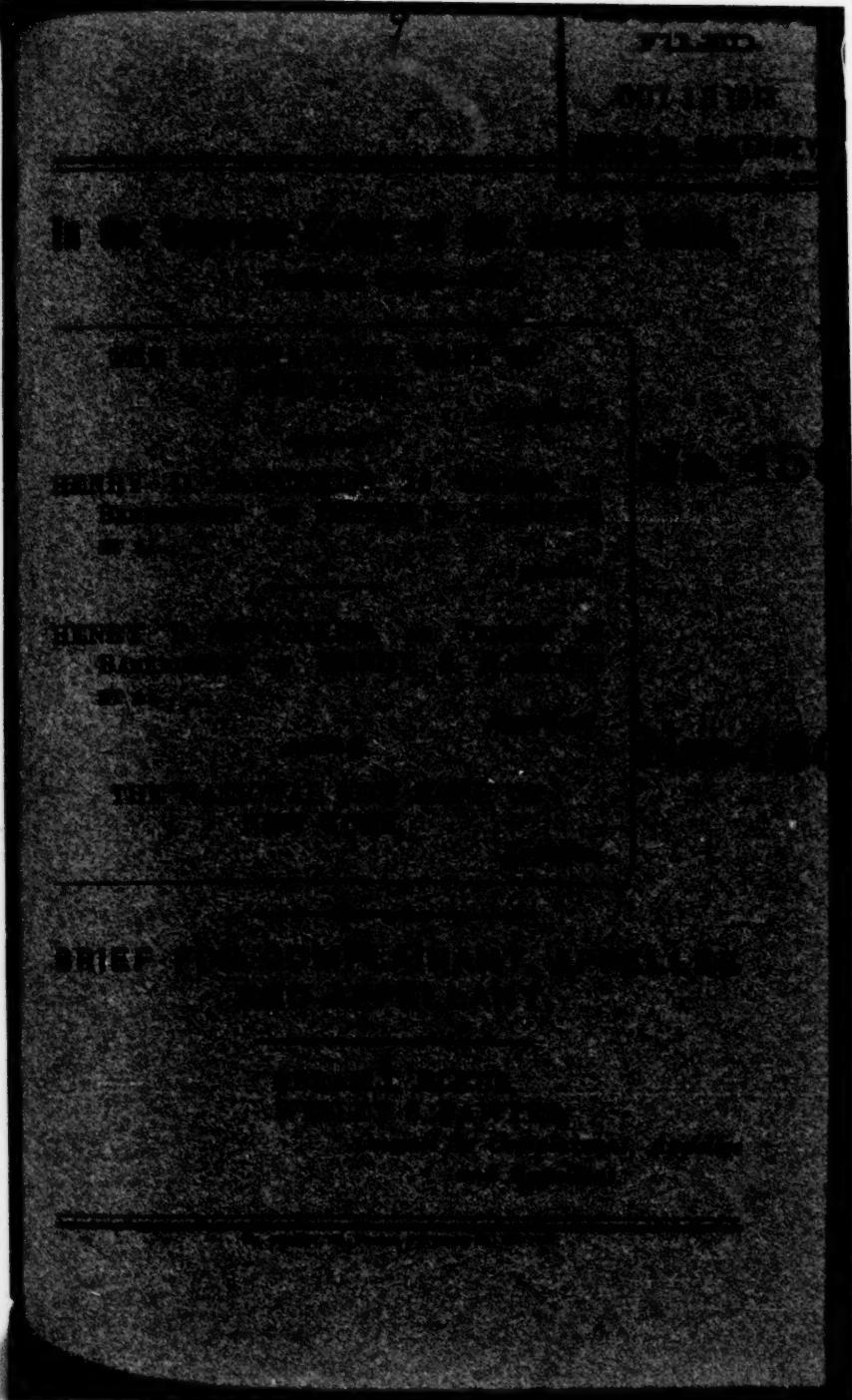
*Third.*—Complainant, as sole Trustee in Bankruptcy of the above-named bankrupts, has administered the affairs of the said bankrupt estate ever since his election as such Trustee, and is familiar with all matters pertaining to said bankruptcy. Complainant has thus far received only nominal compensation for these services, which have extended over a period of three years. In November, 1911, complainant was elected a Justice of the Supreme Court of the State of New York and took office on January 1, 1912. On January 1, 1913, he was designated by the Governor of New York to act as a Justice of the Appellate Division of said Supreme Court and is now so acting. As such Justice complainant is required to pass upon various appeals which may be taken from the Supreme Court and from other lower courts of record to said Appellate Division.

*Fourth.*—The above-entitled cause involves about \$150,000, which, by the terms of the decision of the District Court and and the Circuit Court of Appeals in complainant's favor, would be available for distribution to the creditors of the above-named bankrupts, who are over 150 in number. By reason of the appeal taken by the defendant to this Court the distribution of this amount will necessarily be delayed for probably two years or more. The pendency of this appeal is the principal obstacle in the way of closing up said bankrupt estate and a long delay in deciding the appeal will inevitably work a great hardship upon the creditors of said bankrupts. Complainant is also anxious to be relieved of his trusteeship as soon as possible, because of his official position as a Justice of the New York Supreme Court.

Because of the foregoing facts the undersigned prays this Court for a rule or order advancing said cause, pursuant to subdivision 7 of Rule 26 of this Court, and setting the argument of the appeal herein for some day in the month of October, 1913.

Respectfully submitted,

ABRAM I. ELKUS & WILLIAM A. BARBER,  
Attorneys for Complainant,  
Appellee and Appellant,  
No. 170 Broadway,  
New York City.



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In the Supreme Court of the United States,

OCTOBER TERM—1913.

THE NATIONAL CITY BANK OF  
NEW YORK,  
Appellant,

*against*

No. 974.

HENRY D. HOTCHKISS, as Trustee  
in Bankruptcy, of HENRY S.  
HASKINS, *et al.*,

Appellee.

HENRY D. HOTCHKISS, as Trustee  
in Bankruptcy, of HENRY S.  
HASKINS, *et al.*,

Appellant,

*against*

No. 975.

THE NATIONAL CITY BANK OF  
NEW YORK,

Appellee.

***Brief for Complainant, Appellee and  
Appellant.***

***Statement of Case.***

These are cross appeals from a decree of the United States Circuit Court of Appeals for the Second Circuit, which affirmed a decree of the District Court for the Southern District of New York (*p. 342*).

The defendant, a bank, loaned the bankrupt, a firm of stock brokers, a large sum of money, and later in the same day, with full knowledge, it took the securities for which suit is brought from the defendant, subsequent to the announcement of the latter's suspension, and while a petition in bankruptcy was being prepared, which was also filed the same afternoon (*fols. 85-6*).

The defendant claims that it made the loan to enable the bankrupt to meet its current obligations, and that it was in accordance with general usage that loans thus made should be paid during the day by securities "deliverable by the borrower on the same day" or should be secured by securities which the borrower realized from the proceeds of the loan (*fols. 58-60*).

Suit was brought by the trustee in bankruptcy under § 60 of the Bankruptcy Act to set aside the transfer to the defendant as a voidable preference (*fols. 36-9*).

The District Court for the Southern District of New York by its decree filed April 11th, 1912, affirming the report of a Special Master, directed that the defendant deliver to the complainant the securities in question, with the interest and dividends received thereon from the date of delivery, and in default thereof that the complainant have judgment against the defendant for \$161,740.62, with interest. The defendant appealed to the Circuit Court of Appeals from so much of the decree as adjudged the transfer to be a preference, and the complainant appealed from the measure of damages adopted in the decree, claiming a larger recovery.

The Circuit Court of Appeals affirmed the decree of the District Court and both appeals were brought into this Court (*pp. 343, 348*).

### ***Statement of Facts.***

Lathrop, Haskins & Company were engaged in business as stock brokers in the City of New York for a number of years prior to January 19th, 1910. Henry S Has-

kins was the Stock Exchange member of the firm (*fol.* 404).

#### SITUATION CAUSING FAILURE.

On March 1st, 1909, this firm, with eight other Stock Exchange houses, and James R. Keene, formed a pool or joint venture for the purchase and sale of the common stock of the Columbus & Hocking Coal & Iron Company. The holding capacity of this pool at any one time was 20,000 shares. Lathrop, Haskins & Company participated to the extent of 10,500 shares. This is called "Pool No. 1." It originally was to expire on September 1st, 1909, but by agreement was extended to March 1st, 1910 (*fol.*s. 327-9).

In August, 1909, "Pool No. 2" was organized for the same purpose between Lathrop, Haskins & Company, seven other Stock Exchange houses and James R. Keene. The capacity of this pool was also 20,000 shares and it was to expire on March 1st, 1910. Lathrop, Haskins & Company participated in this pool for 2,000 shares (*fol.*s. 328-9). Their customers participated through the firm (*fol.* 334). Keene was the manager of both pools (*fol.* 328).

On January 19th, 1910, Hocking Coal & Iron stock had not been sold below 80 since November, 1909 (*fol.* 361). Profitable oil wells had recently been opened on the property (*fol.* 860). At the opening of the market on that day Lathrop, Haskins & Company were interested very heavily in this stock (*fol.* 221). This was well known to defendant (*fol.* 609). This stock was up as collateral security for loans with banks and trust companies (*fol.* 363).

#### FINANCIAL CONDITION OF LATHROP, HASKINS & COMPANY ON JANUARY 19TH, 1910, AT 10 A. M.

At the opening of business at 10 A. M. on January 19th, 1910, Lathrop, Haskins & Company were solvent by a large surplus. The financial statement and balance sheet put

in evidence by the defendant shows that at that time Lathrop, Haskins & Company had a net surplus of assets over liabilities amounting to over \$400,000 (*Defendant's Exhibit A, fols. 297-9, 303*).

#### THE LOAN AND BANK ACCOUNT.

Shortly after 10 A. M. that morning the firm sent its demand notes to the National City Bank for \$300,000 and \$200,000 respectively (*Complainant's Exhibits 11 and 12, fols. 438-443*).

These demand notes constituted the sole agreement between Lathrop, Haskins & Company and the defendant (*fol. 450*). No securities were delivered therewith. The demand notes were received by the bank and \$500,000, their amount, was credited to the account of Lathrop, Haskins & Company and entered upon their passbook (*fol. 619*). Similar demand notes for various amounts were for some period of time prior to January 19th, 1910, sent to the bank daily by Lathrop, Haskins & Company, the account being credited with the amount thereof. These notes were paid at the close of each business day by Lathrop, Haskins & Company sending their check for the full amount of that day's note, and the bank would return the note stamped "PAID" (*fols. 411-12*).

Lathrop, Haskins & Company had no account with any other bank ; they deposited all moneys they received in their business, from whatever source derived, with the defendant and it was credited to the firm in the same account (*fols. 413, 434, 619*).

At the opening of business on January 19, 1910, Lathrop, Haskins & Co. had a credit balance with the defendant of \$54,319.98 (*fols. 494, 421*). To this was added the \$500,000 credited by the bank that morning for the two demand notes (*fol. 494*). There were also credited to this account various deposits made by Lathrop, Haskins & Co. during the day amounting to \$374,845.80 (*fols. 466, 494*).

About twelve o'clock noon on January 19, 1910, the condition of their account was as follows :

Balance from January 18, 1910 .....	\$54,319.98
Loan { \$200,000 {	500,000.00
\$300,000 {	
Deposit.....	100,600.00
"	83,400.00
"	31,162.50
"	2,200.00
"	127,000.00
"	200.00
"	30,283.30
	_____
	\$929,165.78
Certified checks drawn.....	535,920.74
	_____
BALANCE ( <i>fol. 421, 466, 493-4, 499....</i>	\$393,245.04

Lathrop Haskins & Co. early in the morning of the 19th drew on the defendant the following checks which they caused to be certified (*fol. 391-2*) :

<i>Payee.</i>	<i>Amount.</i>
Liberty National Bank .....	\$100,095.81
Guaranty Trust Company.....	100,011.11
First National Bank.....	200,340.24
Brooklyn Trust Company.....	100,273.58
A. J. Elias & Co.....	17,500.00
A. J. Elias & Co.....	17,700.00
	_____
	\$535,920.74

The checks payable to banks and trust companies were used to pay moneys borrowed by Lathrop, Haskins & Co. from those banks, and these payments released securities that were pledged as collateral (*fol. 394*). Some of these securities were used to make deliveries on sales made the preceding day and the moneys received upon such deliveries were deposited with the defendant from

time to time (*fol. 433*). Lathrop, Haskins & Co. also deposited throughout the day all sums of money received from other sources in the business and all of the deposits were placed to the credit of this account (*fol. 434-5*).

#### DROP IN HOCKING STOCK, CAUSE OF FAILURE.

Hocking Stock which that morning opened above 80 (*fol. 361*), around 11 o'clock began rapidly to decline. The decline continued until it reached 25 around 2:15 P. M., when it rallied and went to 32½ and closed at 33 (*fol. 309, 310*).

#### SUSPENSION OF LATHROP, HASKINS & CO.

About 12 o'clock noon Mr. Haskins acting at the direction of his attorney Mr. Little sent a letter to the New York Stock Exchange stating that they were "unable to meet their obligations" (*fol. 212, 199*). This letter was received at 12:08 and read at 12:11 by the president of the Stock Exchange from the rostrum on the floor of the Exchange, in the presence of about 250 members (*fol. 196-7, 201-3*). The announcement of the suspension at once came out on the ticker (*fol. 594*).

#### LETTER TO NATIONAL CITY BANK.

At the same time Mr. Haskins sent a letter by messenger to the National City Bank stating that they "were forced to suspend. Assignee will be named later" (*fol. 213, 279*). This letter was delivered to a gentleman sitting at a desk in defendant's office who came back and said all right (*fol. 281, 285*).

#### OFFICERS OF DEFENDANT ALARMED AT DROP, GO TO OFFICE OF LATHROP, HASKINS & COMPANY.

Mr. Albeck, the assistant cashier of the bank, noticed on the ticker the decided fall in the Hocking stock in which he knew Lathrop, Haskins & Co. were heavily interested,

and which he knew was one of their specialties (*fol.* 608-9). He thought the situation very alarming (*fol.* 607), and at once called the attention of Mr. Kilburn, the vice-president, to this heavy fall in Hocking stock, telling him that the bank had made to Lathrop, Haskins & Co. that morning a loan of \$500,000, and that the account of Lathrop, Haskins & Co. was drawn beyond actual deposits to the extent of about \$117,000 (*fol.* 589, 590). At that time the account of Lathrop, Haskins & Co. showed a credit balance of over \$390,000 as against which there were, however, their demand notes for \$500,000 (*fol.* 496). Lathrop, Haskins & Co. had been making deposits from early in the day and it was usual to allow them until 3:00 p. m. to repay the loan (*fol.* 625, 626). Nevertheless, Messrs. Kilburn and Albeck did not wait until 3:00 p. m. to give Lathrop, Haskins & Co. an opportunity to take up their notes nor did they telephone the firm, as was usual if the deposits were not satisfactory (*fol.* 625) but they went at once to the office of Lathrop, Haskins & Co. (*fol.* 545-6).

Their purpose was to protect the bank in case Lathrop, Haskins & Co. "had to fail" or go into bankruptcy (*fol.* 591).

#### AT THE OFFICE OF LATHROP, HASKINS & COMPANY ; COMPLETE FAILURE.

They found the office of Lathrop, Haskins & Co. in a state of great excitement, "first one man and then another—a dozen talking at the same time" (*fol.* 460). They knew that Lathrop, Haskins & Co. were in financial trouble (*fol.* 473), and that they were on the verge of some kind of bankruptcy or insolvency (*fol.* 473).

They were told by Mr. Little, the attorney of the firm, that Lathrop, Haskins & Co. were insolvent and that a petition in bankruptcy was filed or was being filed against them (*fol.* 215). That they could not pay anybody (*fol.* 216). Mr. Little explained to them the whole situation

about the pool, the financial condition, and the enormous loss, about \$2,000,000 (*fol. 221-2*).

Mr. Kilborn and Mr. Albeck testified that while at the office of Lathrop, Haskins & Co. they learned that the suspension of the firm had been announced upon the Stock Exchange (*fol. 482, 490, 594*), and were told that Lathrop, Haskins & Co. were unable to meet their obligations (*fol. 482*); that they were absolutely forced to the wall (*fol. 492*). They knew for a certainty that Lathrop, Haskins & Co. were unable to meet their obligations at that time and it was questionable whether they would be able to do so in the future (*fol. 593*). They were told and understood that Lathrop, Haskins & Co. by what had happened would be forced to the wall and would fail (*fol. 598*) and that the appointment of a receiver had been applied for but had not yet been granted (*fol. 609*).

The officers of the bank asked for money or securities to make up certifications (*fol. 215*). There seems to be some doubt as to whether they asked for money or securities or merely securities (*fol. 483, 603*).

#### DELIVERY OF SECURITIES ABOUT 2:15 P. M.

After two hours of discussion the securities in suit were delivered to Mr. Kilborn (*fol. 216, 454*). Mr. Little, who directed the delivery of the securities, testified that his motive in doing so was to preserve the bank's friendship and good will and that when he delivered the securities to Mr. Kilborn he told him it was a clear preference, preferring them over other creditors, and that it was doing something that ought not to be done, but that the securities could not be in a safer place than in the City Bank (*fol. 217, 218, 222*).

Mr. Little, the attorney for Lathrop, Haskins & Co., who was present throughout the entire interview with the officers of the bank, testified that the securities were delivered after 3:00 p. m. (*fol. 239*).

According to Mr. Kilborn the securities were delivered

about 2:30 P. M. (*fol. 456*). Mr. Albeck testifies that he and Mr. Kilborn had returned with the securities by 2:30 P. M. (*fol. 552*). The officers of the bank gave a receipt specifying the securities and the number thereof (*fols. 445-6*).

The securities were when delivered of the value of \$154,-300, and the claim of the bank against Lathrop, Haskins & Co. amounted to \$116,166.69 (*fols. 130, 131, 191*).

The securities were demanded, delivered and accepted without discrimination or reference as to their source or as to the source of the value represented therein (*fols. 396-400*).

#### WHERE LATHROP, HASKINS & CO. OBTAINED THE SECURITIES DELIVERED.

Of the securities delivered the following had not on that day been under pledge and hence bear no relation to the loan made by defendant (*fol. 397*):

- 200 shares Col. & Hocking Coal and Iron, com.
- 50 shares Miss., Kan. & Tex. R. R. Co., com.
- 50 shares Anaconda Copper Co., com.
- 50 shares Nat. Lead, com.
- 50 shares U. S. Steel Corporation, com. (*fol. 397*).

Of the remainder of the securities delivered the following had been released from pledge by the substitution in the pledge of securities which had been released from pledge by checks drawn on defendant (*fols. 400-1*).

It is unknown, however, to what extent these securities had been pledged and hence unknown to what extent they were so redeemed by substitution. It is also unknown to what extent the securities substituted in the pledge, had been pledged and to what extent redeemed by check drawn on defendant.

- 300 shares Chic., R. I. & Pac. Ry. Co., com.
- 100 " Consol. Gas Co., com.
- 100 " Amer. Smelting & Refining Co., com.
- 100 " New York Central & Hudson R. R. Co.

The remainder of the securities delivered had been released from pledge by the delivery of checks drawn on defendant against the bank balance, deposit and loan.

But it is unknown to what extent they had been pledged and hence to what extent they were thus released. And it is unknown to what extent the checks by which they were released were drawn against the bank balance and deposits.

#### FINANCIAL CONDITION OF LATHROP, HASKINS & CO. WHEN SECURITIES WERE DELIVERED.

There is some difference in the testimony as to the exact time when the securities were delivered. Mr. Little places it after 3:00 P. M. (*fol. 239*). Mr. Kilborn at after one o'clock and before 2:30 P. M. (*fol. 456*), and Mr. Albeck at prior to 2:30 P. M. (*fol. 552*). We have, therefore, taken 2:15 P. M. on January 19, 1910, as the time when the securities were delivered by Lathrop, Haskins & Co. and received by defendant. At that time the firm and the individual members thereof were clearly insolvent. The financial standing of the firm, as shown from the books, is as follows :

Liabilities .....	\$1,936,035.64
Assets .....	1,334,875.31
Excess of Liabilities .....	\$601,160.33

over assets as shown on the books (*fol. 192*).

The actual extent of the insolvency is shown to be much greater than this by reason of the worthless character of certain accounts carried on the books as assets. The defendant's experts examined the books of the firm and no fault has been found with this statement of the financial condition at that time, 2:15 P. M. (*fol. 105-6*).

It is conceded that Mr. Haskins and Mr. Leverich the only general partners were insolvent (*fol. 447,863*). Further details as to the financial condition of Lathrop, Haskins & Co. on January 19, 1910, will be taken up in Point I.

### BANKRUPTCY PROCEEDINGS AND ADJUDICATION.

At 4:10 P. M. of January 19th, within two hours after Mr. Albeck, the assistant cashier of the defendant, testified that the securities were delivered, and less than one hour after the bank received the securities, according to the testimony of Mr. Little, a petition in involuntary bankruptcy was filed and thereafter Lathrop, Haskins & Co. and the individual members thereof were duly adjudicated bankrupts (*fol. 85*).

The schedules show an excess of liabilities over assets of \$1,018,121.37 (*fols. 98, 103*). The claims filed with the referee and allowed are also in evidence. Unsecured claims amounting to \$2,369,384.29 and secured claims amounting to \$738,302.12 have been filed and allowed (*fols. 356, 884, 885*).

### ISSUES.

The complainant contends that the transfer of the securities by Lathrop, Haskins & Co. to the defendant on the afternoon of January 19, 1910, constitutes a preference, voidable under Section 60 of the Bankruptcy Act; that the transfer was made within four months of the filing of the involuntary petition against Lathrop, Haskins & Co. when that firm and the individual members thereof were insolvent, and was without present fair and valuable consideration; that the defendant had reasonable cause to believe that said firm was insolvent and that a preference was thereby intended; and that the effect of the transfer was to enable the defendant to realize a greater percentage of its claim than any of the other creditors of the firm of Lathrop Haskins & Co. or the individual members thereof, of the same class. The answer of the defendant admits the transfer and puts in issue all the other material elements of a voidable preference under the Bankruptcy Act.

In addition the defendant, has alleged in paragraph XI of its answer, a custom or usage "that loans thus made should either be paid off during the day out of the proceeds of

securities which were deliverable by the borrowers on the same day, or in the event of payment not being made in full, the remainder of such loan *should be secured* before the close of business on the same day, by securities obtained by the said firm with the proceeds of such loan" (fol. 59).

As to this alleged custom or usage the complainant contends:

1st. That the defendant has failed to establish the custom or usage set up in its answer.

2nd. That the defendant has failed to establish any valid custom or usage that will be recognized by the courts.

3rd. That the custom or usage claimed by the defendant is not competent or admissible, because it directly tends to change and vary the terms of the written contract of the parties.

4th. That the custom or usage is not operative to give the bank a lien, equitable or otherwise, upon the securities at any time prior to the actual delivery.

5th. That the principle of equitable subrogation is not applicable to this case.

#### ASSIGNMENT OF ERRORS:

As to the measure of damages the complainant contends:

(1) That he is entitled to recover the value of the securities at the date of delivery with interest to the date of the final decree April 11, 1912, and interest on the judgment.

(2) That the decree is incorrect in any view and fails to follow the report of the Master in that it does not allow interest on dividends received, and the alternative recovery is nearly \$1,000 too small based on the Master's report.

(3) Since the value of the stocks has depreciated since the date of the trial and since the date of the final decree, this Court should direct that the defendant be charged with such depreciation.

**POINTS.****I.**

*Lathrop, Haskins and Co. and its individual members were insolvent on the afternoon of January 19th, 1910, when the securities were delivered to the defendant.*

Mr. Little the attorney for Lathorp, Haskins & Co. who finally directed the delivery of the securities places the time as after 3:00 P. M. His testimony is direct, detailed and convincing (*fol. 240*). Mr. Kilborn, vice-president of the bank, does not think he can tell the time, but places it as after 1 P. M., and earlier than 2:30 P. M. (*fol. 456*). Mr. Albeck, the assistant cashier, places the time at about 2:00 P. M. (*fol. 594*).

We have taken the time when the securities were delivered as 2:15 P. M. Hocking stock had been down to 25 and rallied around 2:15 P. M., and later went to 32½ (*fol. 310*). In ascertaining the financial condition we have taken Hocking stock at 32 that being its market value on the New York Stock Exchange at that time (*fol. 310, 318*).

In ascertaining the value of securities, those that were dealt in on the Exchange were valued at prices taken from the Stock Exchange lists of sales, giving the market quotations of those securities on January 19th, 1910, at 2:15 P. M. Those that were not dealt in on the Exchange were valued at the prices which they sold for at that time off the Exchange, as shown by "The Evening Sun" of January 19, 1910 (*fol. 114-5*).

The defendant "concedes that the securities, in so far as they were listed on the New York Stock Exchange, were valued at the market quotation which prevailed at 2:15 P. M. on that date, and that the securities which were not listed were reasonably worth the valuations placed upon them" (*fol. 287*).

In arriving at the amounts due to and from customers

and banks where securities were pledged as collateral, the account was closed out as of 2:15 P. M. (*fol. 324, 344-5, 383, 425*). But where the loan was sold out on that day the price which the bank actually received was taken (*fol. 345*).

The value of all the securities which Lathrop, Haskins & Company had on hand has fallen somewhat since January 19, 1910 (*fol. 424*). Hocking stock after its collapse to 25 on January 19, steadily declined to 18 in February, then to 14 in March, and in the summer to 5, and the last sale was at 2 (*fol. 423*). Thus, in taking the value of the stocks as of 2:15 P. M. on January 19, we have been most fair to defendant.

**FINANCIAL CONDITION OF LATHROP, HASKINS & CO. ON  
JANUARY 19, 1910, AT 2:15 P. M.**

The direct testimony as to the financial condition of the bankrupts at 2:15 P. M. is summarized as follows (*fol. 301-3*) :

Due from customers.....	\$705,618.10
Due from members of N. Y. Stock Exchange, pool subscribers.....	66,390.16
Due from members of N. Y. Stock Exchange (other transactions).....	2,190.30
Securities on hand.....	160,828.00
Securities with National City Bank.....	154,300.00
Office furniture.....	952.25
Money loaned.....	63,864.84
Petty cash.....	131.66
Due from Banks and Trust Cos.....	99,600.00
Membership N. Y. Stock Exchange.....	75,000.00
	_____
	\$1,329,875.81

*Liabilities.*

Due to customers.....	\$747,361.50
Due to members N. Y. Stock Exchange.....	858,813.95
Due to Banks and Trust Cos.....	213,693.50
Due to National City Bank.....	116,166.69
	<hr/>
	\$1,936,035.64

Excess of liabilities over assets as shown on books.....	\$606,160.33
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To the value of securities on bond must be added \$5,000, the value of 79 shares Columbus & Hocking Coal & Iron Co. preferred (*fol. 289*). The securities delivered to the defendant were of the value of \$154,300.

## BAD ACCOUNTS.

From the amount due from customers must be deducted the following worthless accounts:

E. S. Lucas.....	\$8,376.50 ( <i>fol. 146</i> ).
L. Bernheimer, Trustee.....	3,355.37 ( <i>fol. 153</i> ).
John F. Alexander.....	8,470.40 ( <i>fol. 245</i> ).
Allela L. Dunn .....	6,774.18 ( <i>fol. 251</i> ).
Crank M. Cronise.....	7,955.27 ( <i>fol. 256</i> ).
Moses L. Eiseman.....	14,757.88 ( <i>fol. 262-3</i> ).
Vera B. Lavergne.....	4,808.08 ( <i>fol. 270</i> ).
O. B. Smith .....	15,030.12 ( <i>fol. 354</i> ).
Carrie H. Midgely.....	4,024.52 ( <i>fol. 293</i> ).
E. J. Garvan.....	9,643.62 ( <i>fol. 488</i> ).
	<hr/>
	\$83,195.94

CLAIM AGAINST COLUMBUS & HOCKING CLAY  
CONSTRUCTION COMPANY.

This claim, amounting to \$229,060.41, is included in the foregoing statement of assets (*fol. 139*). The company is in the hands of a receiver and has no assets, and the claim is worthless (*fol. 520-1*).

### DOUBTFUL ACCOUNTS.

The following claims are also included as assets in the foregoing statement (*fol. 138-42*). While these claims may not be absolutely worthless, yet no definite value can be placed upon them, and an allowance must be made for them in determining the true financial condition:

Wallace Irwin ( <i>fol. 157</i> ).....	\$1,011.78
Oliver Gildersleeve ( <i>fol. 162</i> ).....	2,851.46
James R. Keene ( <i>fol. 164</i> ).....	62,817.68
Louis Breslauer ( <i>fol. 165</i> ).....	3,629.05
C. T. Willard ( <i>fol. 166</i> ) .....	6,482.16
H. O. Seixis ( <i>fol. 166</i> ).....	17,696.37
Herman Weiss ( <i>fol. 168</i> ).....	868.00
Mrs. J. B. Bruyn ( <i>fol. 170</i> ). ....	2,851.46
W. C. Curtis ( <i>fol. 170</i> ) .....	2,851.47
W. F. Osborne ( <i>fol. 170</i> ) .....	14,257.32
Berthold Levi ( <i>fol. 165-265</i> ).....	198,175.16
<hr/>	
	\$313,491.90

### INSOLVENCY OF THE INDIVIDUAL MEMBERS OF LATHROP, HASKINS & CO.

It is conceded that Henry Leverich, a member of the firm of Lathrop, Haskins & Co., is insolvent and has no assets, and that on January 19th, 1910, he had no assets but had individual liabilities of \$100,000 (*fol. 447*). It is also conceded that at the time the defendant received the securities in controversy Henry S. Haskins, the other general partner of the firm of Lathrop, Haskins & Co., had no assets individually, except his seat on the New York Stock Exchange (*fol. 864*). This seat in the Stock Exchange, valued at \$75,000, has already been included as a firm asset (*fol. 302*; *Compt.'s Exhibit 10*).

### PETITION IN BANKRUPTCY AND ADJUDICATION.

The involuntary petition in bankruptcy was filed January 19th, 1910, at 4:10 P. M., less than two hours after the bank received the securities (*Compl't.'s Exhibit 1; fol. 87*. An order was entered thereon adjudicating Lathrop, Haskins & Co. and its individual members involuntary bankrupts (*Bill, Par. 1, conceded by defendant, fol. 80*).

### ALLOWED CLAIMS FILED IN BANKRUPTCY PROCEEDINGS.

One hundred and fifty-four claims, amounting to \$2,369,384.29, have been filed by creditors with the referee, and have been allowed by him.

Five secured claims, amounting to \$738,302.12, have been filed by banks and trust companies (*fol. 884-5, 356*).

### SCHEDULES IN BANKRUPTCY.

The schedules in bankruptcy of Lathrop, Haskins & Co., which are in evidence, show an excess of firm liabilities over firm assets of \$1,018,121.37 (*Compl't.'s Exhibit 2; fol. 99, 103*).

### SUMMARY.

1. Excess of liabilities, as shown by the books of Lathrop, Haskins & Co., on January 19, 1910, at 2:15 P. M., as set forth in Compl't.'s Exhibit 10.....	\$606,160.33
From this should be deducted for 79 shares preferred stock Columbus & Hocking & Iron Co.....	5,000.00
	_____
	\$601,160.33
To this should be added bad accounts due from customers.....	83,195.84
and worthless claim against the Columbus & Hocking Clay Construction Company..	\$229,060.41
	_____
excess of liabilities over assets at that time of. Allowance should be made for disputed ac- counts.....	\$913,416.58
	313,491.90

2. The individual members of Lathrop, Haskins & Co. were conceded to be insolvent on January 19th, 1910, at 2:15 P. M.

3. The petition in bankruptcy by which Lathrop, Haskins & Co. and its individual members were subsequently adjudicated involuntary bankrupts was filed at 4:10 P. M. that afternoon, less than two hours after the delivery of the securities to the defendant.

4. Unsecured claims aggregating upwards of \$2,300,000 have been filed against Lathrop, Haskins & Co. and allowed by the referee, and claims of upwards of \$700,000 have likewise been filed against the bankrupt estate.

5. Schedules in bankruptcy sworn to by the bankrupts show that the firm was insolvent on the 19th day of January, 1910, at 2:15 P. M., to the extent of upwards of \$1,000,000.

### III.

*The transfer of securities by Lathrop, Haskins & Company to defendant was within four months of the filing of the petition in bankruptcy and was without a present fair and valuable consideration. The defendant thus obtained a greater percentage of its claim than any other general creditor of Lathrop, Haskins & Company.*

It has been shown under Point I that on the afternoon of January 19th, 1910, when the securities were transferred, Lathrop, Haskins & Company, and its individual members, were insolvent to the extent of at least \$900,000. The involuntary petition in bankruptcy was filed that very afternoon.

It is undisputed that the securities valued at \$154,300 were the property of Lathrop, Haskins & Company.

The loan of \$500,000 by the defendant to Lathrop,

Haskins & Co. was made on the morning of January 19th, 1910. At that time their demand notes for \$300,000 and \$200,000 were delivered to the bank, and the firm was given credit therefor on the books of the bank and in the pass-book of the firm (*fol. 388, 439, 450, 619*). At substantially the same time Lathrop, Haskins & Co. drew the checks on the defendant which the defendant certified (*fol. 390, 437, 461*).

The securities were delivered on the afternoon of that day to take up these notes (*fol. 483*).

The securities transferred are more than sufficient in value to pay the entire amount of the claim of the defendant against Lathrop, Haskins & Company on January 19th, 1910, amounting to \$116,166.69. It follows, therefore, as a matter of course, that the effect of the transfer was to enable the National City Bank to obtain a greater percentage of its claim against the firm of Lathrop, Haskins & Company than any of the other creditors of the same class.

*Crooks vs. People's National Bank, 46 App. Div., 335.*

In *Continental Trust Co. vs. Chicago Title Co.* (229 U. S., 435), the bankrupt had certain certificates of deposit placed as security for contracts made on the Board of Trade. The bank which issued such certificates, and Anderson & Co. made arrangements with the bankrupt whereby Anderson & Co. were substituted in said contracts to the position of the bankrupt, and they depositing their own security released the trust certificates to the defendant bank which applied them to its general account with the bankrupt. This was all one transaction. It was found, as a fact, that but for this arrangement the contracts and the certificates would have been lost to the estate and hence there was no diminution of the estate.

In the present case it is impossible to consider the

making of the loan in the morning when the bankrupts were clearly solvent, as one transaction with the taking of the securities by the bank in an effort to protect itself in the afternoon when insolvency was known. There was no contract for a lien on securities in the possession of the bankrupts. There was no custom contemplating such a lien, and all the acts of the parties negative such an idea. A delivery of securities was not contemplated, and had never previously occurred in the dealings of the parties. The intention was that the brokers were to pay by check and not to force a loan extending beyond the day upon the bank. The claims of others, including banks, had arisen between the loan and the seizing of the securities. There is no possible way of telling to what extent any of the securities seized were cleared by the loan made by defendant.

There was in the case at bar a clear depletion of the estate to the extent to which the bank seized security for an unsecured loan. The advantage to the bank measured the loss to the estate.

### III.

#### *Defendant had reasonable cause to believe that a preference was intended.*

The knowledge on the part of the defendant of the insolvent condition of Lathrop, Haskins & Co., on the afternoon of January 19th, 1910, when the securities were transferred, has been established by the complainant with a positiveness that admits of no doubt.

Knowledge of such insolvency is brought home to the bank:

By the announcement of the suspension of Lathrop, Haskins & Co. on the New York Stock Exchange;

By the letter of Lathrop, Haskins & Co. to the defendant, notifying it that they were forced to suspend;

And by the occurrences in the office of Lathrop, Haskins & Co. on the afternoon of January 19th, 1910, before the securities were delivered to the bank, as testified to by Mr. Kilborn, vice-president of the National City Bank, Mr. Albeck, its assistant cashier, and Robert F. Little, the attorney for Lathrop, Haskins & Co.

#### **ANNOUNCEMENT OF LATHROP, HASKINS & COMPANY'S SUSPENSION ON NEW YORK STOCK EXCHANGE.**

At 12:11 P. M. on January 19th, 1910, the suspension of Lathrop, Haskins & Co. was announced on the floor of the New York Stock Exchange. Their letter to the Secretary of the Exchange, informing him of their inability to meet their obligations was at that time read from the rostrum by the President of the Exchange, in the presence of about 250 brokers (*fol. 201-3, Plaintiff's Exhibit 9*).

This came right out on the ticker and gave wide publicity to the suspension (*fol. 595*).

#### **LETTER TO THE NATIONAL CITY BANK.**

At the same time that this letter was sent to the New York Stock Exchange, Lathrop, Haskins & Co. sent another letter to the defendant. Henry Petersen, a boy in the employ of Lathrop, Haskins & Co., took the letter to the bank between 11:30 and 12:30—close on to twelve o'clock. He gave the letter to a man sitting at one of the desks in the bank (*fol. 276, 275*). When Petersen left the office it had been rumored that Lathrop, Haskins & Co. had failed. He was anxious to ascertain whether such was the case, and therefore glanced over the shoulder of the man who was reading the letter he had presented and noted its contents (*fol. 276*). The letter consisted of little more than a line (*fol. 279; Plaintiff's Exhibit 9*). The letter showed a permanent rather than a temporary condition of

financial difficulty. This letter neither Mr. Kilburn, the vice-president, nor Mr. Albeck, the assistant cashier of the bank, recalled having seen, although their testimony on this point is uncertain (*fol. 474-5*).

#### KNOWLEDGE OF THE BANK, SHOWN BY THE TESTIMONY OF MR. KILBORN.

Mr. Kilborn went to the office of Lathrop, Haskins & Co. with Mr. Albeck, the assistant cashier of the National City Bank, on the afternoon of January 19th. Before he went there he was told that Hocking stock, in which Lathrop, Haskins & Co. were heavily interested, had "declined heavily," and that they were in financial trouble and on the verge of some kind of insolvency (*fol. 472-3*). Although the books showed a credit balance in favor of Lathrop, Haskins & Co. of over \$390,000 at the time he went to their office, Mr. Kilborn did not wait until three o'clock to give them the usual opportunity to take up the \$500,000 notes, the amount of their loans from the bank on that day (*fol. 489-496*).

There was a great deal of excitement in the office when Mr. Kilborn got there (*fol. 469*). Mr. Kilborn told Mr. Haskins and Mr. Leverich that the bank had certified checks for \$150,000 more than their actual deposits, and in view of the situation of their firm and their being in trouble, he insisted that that \$150,000 be made good (*fol. 479*). He did not ask for money to make good their obligations, although he would have taken it. He asked for securities to make good the obligations of Lathrop, Haskins & Co. (*fol. 483-4*). They told him they were in financial trouble and that they were absolutely forced to the wall (*fol. 492*). They told him the reason of the financial trouble and about the break in the Hocking stock (*fol. 491*). While he was in their office and before he received the securities, he was told that the suspension of Lathrop, Haskins & Co. had been announced on the floor of the New York Stock Exchange, and he knew that the

form of that announcement was that they were unable to meet their obligations (*fol. 481-2*).

He obtained the securities some time before 2:30 o'clock and gave a receipt for them (*fol. 457, Complainant's Exhibit 13, fol. 444*).

#### KNOWLEDGE OF THE BANK AS SHOWN BY TESTIMONY OF MR. ALBECK.

Mr. Albeck, the assistant cashier of the National City Bank, testified that he noticed the drop in Hocking stock on the morning of the 19th of January after Lathrop, Haskins & Co. had obtained their \$500,000 loan from the bank (*fol. 589*). He knew that Lathrop, Haskins & Co. were heavily interested in the stock, and that Hocking was one of their specialties (*fol. 589, 609*). He called Mr. Kilborn's attention to the drop in the securities and informed him that the bank had loaned Lathrop, Haskins & Co. \$500,000 that morning. He examined their deposits and told Mr. Kilborn that the "difference" amounted to about \$117,000. Mr. Kilborn suggested that they go down to see Lathrop, Haskins & Co., which they did (*fol. 606*), between 11:30 and 12 o'clock (*fol. 587*). They went to protect the bank in case there was a failure (*fol. 591*).

Mr. Albeck thought the situation was a very alarming one and called for immediate action on the part of the bank in order to protect itself. They wanted to see the bank's obligation taken care of, paid or secured at the earliest possible moment (*fol. 607-8*). It was an urgent matter, calling for immediate action (*fol. 608*). Their object in going was that the bank should be secured in case Lathrop, Haskins & Co. had to fail or go into bankruptcy (*fol. 591*).

Mr. Kilborn spoke to Little and Haskins and said that they had noticed that Hocking Coal & Iron Co. stock was breaking badly and they came over to see what condition the firm was in (*fol. 597*). They asked payment of their indebtedness; asked for money or security, but

Mr. Albeck does not remember that anyone told him that they had no money (*fol. 604*). They were told to wait. Mr. Little and Mr. Haskins told them that Lathrop, Haskins & Co. could not go on because of what happened to Hocking stock (*fol. 596*), and that under the conditions they could not meet their obligations (*fol. 597*), that they would be forced to the wall by what had happened. Mr. Albeck understood that to mean that Lathrop, Haskins & Co. would fail in business (*fol. 598*).

While at Lathrop, Haskins & Company's office and before they received the securities Kilborn and Albeck learned that the suspension of the firm had been announced on the Stock Exchange (*fol. 588*).

At folios 591-3 of the record Mr. Albeck testified as follows :

" You went there to protect yourself in case there was a failure, didn't you ? A. Yes.

Q. So that you would be secured in case Lathrop, Haskins & Co. had to fail or go into bankruptcy ; that was your object in going up there ? A. Yes, sir.

Q. And after you got there and heard of their suspension you did then expect their failure ? A. Well, not necessarily.

Q. You had a reasonable ground to believe that they were going to fail or become bankrupts ? A. Not necessarily.

Q. No ; but you did, didn't you ? A. No.

Q. Wasn't that a fair expectation ? A. Suspensions do not always mean failures.

Q. But in most cases they do, don't they ? A. In most cases, yes.

Q. But at the time the suspension was announced you knew as a matter of certainty that they (Lathrop, Haskins & Co.) could not meet their obligations ? A. Yes, sir."

During the first hour that they were waiting at the office of Lathrop, Haskins & Co., a member of that firm told Mr. Kilborn and Mr. Albeck that an application was being made to the Court for the appointment of a receiver of the

firm ; that this application had not yet been granted (*fol.* 609-10).

"Q. Did anybody tell you a Receiver had been applied for? A. Yes, but he had not been appointed.

"Who told you? A. I cannot say; it was one of the firm—

Q. While you were waiting there during the first hour they said an application was being made to the Court to appoint a Receiver of the firm? A. Yes, sir.

Q. And it had not yet been granted? A. It had not yet been granted" (*fol.* 609).

Finally, after a wait of about two hours, Kilborn and Albeck were handed the securities and gave a receipt for them and left directly for the bank, which was about three or four minutes' walk from Lathrop, Haskins & Company's place of business. They arrived at the bank about 2:30 (*fol.* 552).

#### KNOWLEDGE OF THE DEFENDANT AS DISCLOSED BY TESTIMONY OF MR. LITTLE.

Mr. Little was the attorney for Lathrop, Haskins & Co., and was in their office all afternoon on the 19th of January, 1910 (*fol.* 211). Mr. Kilborn and another gentleman came into the office between 1 and 1:30 P. M. Little saw Kilborn as soon as he came in (*fol.* 214). Kilborn stated that he had heard of the break in Hocking stock and of Lathrop, Haskins & Company's trouble and wanted payment of the bank's obligations (*fol.* 215). Little told Kilborn that Lathrop, Haskins & Co. were insolvent and that a petition in bankruptcy was either filed or being filed against them, and that they could not pay anybody (*fol.* 216). Little went into the financial condition of the firm of Lathrop, Haskins & Co. very fully with Kilborn. He explained the whole situation about the pool with Keene, went into the details of the pool, and told Kilborn that Lathrop, Haskins & Co. would lose \$2,000,000 (*fol.* 221).

Little told Mr. Kilborn that Lathrop, Haskins & Co. could not meet their obligations and that in paying the bank they were doing something they ought not to do (*fol. 222*). Little debated that question with Kilborn for nearly two hours. Lathrop, Haskins & Co. were old customers of the bank and desired its good will. Mr. Little wanted the relations between the bank and Lathrop, Haskins & Co. as friendly as possible and that was the motive that inspired him in directing delivery of the securities to Mr. Kilborn (*fol. 218*). When he gave the securities to Kilborn, Little told him that it was a clear preference, was preferring the bank over other creditors, but that the securities could not be in a safer place than with the National City Bank (*fol. 219-20*). Little is positive in his testimony that he gave Mr. Kilborn his securities after the close of the Stock Exchange, *i. e.*, after three o'clock that afternoon (*fol. 240*).

#### FILING OF PETITION IN BANKRUPTCY.

The petition in bankruptcy against the firm of Lathrop, Haskins & Co. and the individual members thereof was filed at 10 minutes past 4 o'clock on the afternoon of January 19th, 1910, less than 2 hours after the bank received the securities in suit, according to the testimony of Mr. Albeck, its assistant cashier, and less than an hour after Mr. Little testified that the securities were given to Mr. Kilborn (*Compl't.'s Ex. I*; *fol. 552, 240*).

If ever there was a case where a trustee established beyond question a creditor's reasonable cause to believe that a preference was intended, this is that case.

The bank had actual knowledge that Lathrop, Haskins & Co. were insolvent, yet the statute does not require actual knowledge, but only that the creditor shall have reasonable cause to believe that a preference was intended.

*Loveland on Bankruptcy*, 3rd ed., p. 561; *Remington on Bankruptcy*, Secs. 1398-1399; *Bardes vs. The Bank*, 122 Iowa, 443; 12 A. B. R., 771;

*Sundheim vs. Ridge Avenue Bank, 138 Fed. Rep., 951; 15 A. B. R., 132;*  
*Parker vs. Black, 143 Fed. Rep., 560; 16 A. B. R., 202;*  
*Re Hines, 144 Fed. Rep., 543; 16 A. B. R., 495;*  
*Wetstein vs. Franciscus, 133 Fed. Rep., 900; 13 A. B. R., 326;*  
*Pratt vs. Columbia Bank, 157 Fed. Rep., 137; 18 A. B. R., 406.*

In *Pratt vs. Columbia Bank, 157 Fed., 137*, HOUGH, J., said :

"The meaning of the words, ' reasonable cause to believe ' has been too often subject to decision to require extended citation of authority. Knowledge is not necessary nor even belief, but only reasonable cause to believe, which is a different thing (*Bank vs. Cook, 95 U. S., 343*)."

The existence of a general financial crisis should put a prudent man upon inquiry with reference to doubtful debtors.

*Clarke vs. Daughtrey, 10 Nat. Bank. Reg., 21* (not elsewhere reported).

In accepting the securities in the face of this complete knowledge of the firm's financial condition, the bank was simply taking its chances.

Intent on the part of the debtor to give a preference need not be shown by affirmative proof, but flows from the knowledge of insolvency on the part of the debtor.

*Pirie vs. Title Co., 182 U. S., 438, 454; 45 L. ed., 1171;*  
*Benedict vs. Deshel, 177 New York, 1;*  
*Alexander vs. Redmond, 180 Fed., 92: 24 A. B. R., 620.*

In *Alexander vs. Redmond* (24 A. B. R., 620, 623; 180 Fed., 92), LACOMBE, J., said :

"We do not think the intent of Boorn & Co. is material, because the statute expressly provides that a transfer by an insolvent person within the four months' period shall be deemed to be a preference of its effect shall be to enable any creditor to obtain a greater percentage than others of his class. The result of the transfer and not the mental attitude of the transferror is made the test."

#### IV.

*The defendant has failed to establish the custom pleaded, and has failed to establish any valid custom or usage.*

The complainant has established all the elements necessary to prove a preferential payment or delivery of securities, with practically no denial of any of the material facts by the defendant.

It cannot be fairly claimed that the element of custom or usage in any way affects the delivery to the defendant, on the afternoon of the 19th of January of the securities that were not in any loans on that day, and were not therefore obtained or released with the use of checks drawn by Lathrop, Haskins & Co. and certified by the defendant.

A list of those securities has been set forth.

As to such securities therefore the complainant having established a preference under the Bankruptcy Act, is entitled to a decree directing the payment of their reasonable value, in their return.

#### A CUSTOM OF USAGE MUST BE PROVED BY FACTS AND INSTANCES AND NOT BY OPINION AND UNDERSTANDING.

Before describing in detail the testimony of defendant's various witnesses to establish custom or usage, we point out that the material part of such testimony is wholly made up of the opinion and understanding of the

witnesses, what they now say was *expected* by them and their banks in a transaction similar to that in controversy.

Such testimony is not competent to establish a custom or usage.

Defendant invokes a claimed usage as a part of the contract. A usage cannot be proven by the opinion of witnesses as to the law or as to what should be a rule. It cannot be proven by the opinion or understanding of witnesses. It must be shown solely by specific instances that have been acquiesced in.

*Home Ins. Co. vs. Weide*, 78 U. S., 438;  
*The John H. Cannon*, 51 Fed. Rep., 46;  
*Ames Co. vs. Kimball Co.*, 125 Fed. Rep.,  
 332;  
*Allen vs. Bunk*, 22 Wend., 145, 223;  
*Mills vs. Hallock*, 2 Ed. Ch., 651.

In *Mills vs. Hallock* (2 Ed. Ch., 651, 655), McCoun, V. C., said :

"The difficulty about the testimony on the part of the complainant is that it amounts to no more than the mere opinion or private understanding of authorities.

A custom must be proved by evidence of facts (and not by mere speculative opinions) by means of witnesses who have had frequent and actual experience of the custom.

The testimony of those who speak from report only and not from particular instances within their own knowledge if receivable at all is of no weight (4 Starkie, 452). The witnesses here do not speak of particular instances within their own knowledge where the right to reclaim goods has been asserted on the ground of such conditional delivery and been acquiesced in by purchasers. There is no evidence of facts. No evidence that the purchasers have had frequent and actual experience of the custom; and without this I cannot say the custom exists."

In *Ames Co. vs. Kimball*, 125 Fed., 232, DE HAVEN, D. J., at page 335, says :

"The defendant sought upon the trial to show a local usage at the port of Nome exempting persons engaged in lighterage merchandise from liability for loss or damage to such merchandise occasioned solely by perils of the sea, but the evidence offered was not sufficient to establish such a usage. No witness testified to any instance in which such a usage had been recognized and acted upon by the parties interested, when goods had been lost or damaged by perils of the sea while being lightered to the beach at Nome. Two witnesses stated generally that there was such a usage; but one seems to have based his statement upon the fact that he had previously entered into an agreement with the North Coast Lighterage Company to do lighterage for him, in which it was agreed that the lighterage company was not to be liable for damage or loss of goods while in transit from the ship to the shore; and the other, upon conversation he had had with persons engaged in the business of lighterage, in which he was informed by them that they would not be responsible for loss or damage occasioned by perils of the sea. This evidence is certainly not sufficient to establish a usage. 'Usage is a matter of fact, not of opinion. Usage of trade is a course of dealing; a mode of conducting transactions of a particular kind. It is proved by witnesses testifying of its existence and uniformity from their knowledge obtained by observation of what is practiced by themselves and others in the trade to which it relates' (*Haskins vs. Warren*, 115 Mass., 535). And in *Duer on Ins.*, Vol. I, page 182, it is said :

'The existence of a usage, whatever may be the nature of the subject to which it relates, is in all cases a fact; a complex fact, it is true, resulting from a variety and a succession of individual acts, but still a fact, to be proved like all other facts, by the testimony of witnesses speaking from their personal knowledge. It is not created by hypothetical opinions, but by actual practice, and can only be established by a series of acts of a similar character.'

and import, performed at different times, by different persons. It is to these acts that the testimony, properly restrained and directed, should be strictly confined, and it is upon their number, uniformity, and notoriety that the weight and value of the evidence depends. Hence, where a witness swears generally that a particular usage exists, yet is unable to state from his own knowledge any instance of its actual observance, his testimony should at once be rejected; and it is only by a strict adherence to this rule that the important distinction between the evidence of opinions and belief and that of fact is possible to be maintained."

In *re Cannon* (51 Fed., 46), MORRIS, D. J., at page 47, says:

"In the present case it would seem that what is spoken of as a usage was, in fact, rather the prevailing belief among underwriters and adjusters in Baltimore that the general law did not recognize the right to contribution for jettison of a deck cargo of lumber. It was rather a local understanding of the general law than a local usage of trade, the cases being so few and infrequent that no usage could be said to be established by them."

In *Home Ins. Co. vs. Weide* (78 U. S., 438), Mr. Justice DAVIS, at page 439, says:

"As this case will have to go back for a new trial, and as the point was raised in the Court below, it may be proper to observe that no witness can be asked what the course of trade is, in reference to this particular business. This *would be either opinion or hearsay*. He can only be allowed to tell his personal experience on the subject about which he is called to testify. It is only through the aggregated testimony of all the witnesses that the fact can be proved which so connects itself with the plaintiff's business as to require from him an answer."

All of the testimony of witnesses called to prove the custom, who testify, merely, to their opinion as to the rights of third parties under circumstances which never occurred before, should therefore be entirely disregarded.

#### COURSE OF DEALING BETWEEN LATHROP, HASKINS & CO. AND THE DEFENDANT.

Lathrop, Haskins & Co. had but one bank account, and that with the National City Bank. For some time prior to January 19, 1910, they sent their demand notes to the bank daily in varying amounts. These notes were all similar in form and substance to the demand notes sent on the morning of the 19th of January, 1910 (*Compl't.'s Exhibits 11 and 12*), providing among other things that the bank was to have a lien for its advances on *all securities in its possession* belonging to the brokers, with the right at any time to demand additional security (*fol. 439*).

The demand notes were brought in daily at about ten o'clock in the morning, and the amounts thereof credited to the account of Lathrop, Haskins & Co., added to their balances on hand, and entered in their pass-book just as in the case of any loan with collateral (*fol. 411, 437, 402, 619*).

In this account were also credited the deposits made in the course of the day of receipts from all sources (*fol. 411*).

Lathrop, Haskins & Co., drew checks to anybody they pleased against their balances with the bank (*fol. 620*).

They deposited in their account with the bank all of the moneys received by them in the course of the day, including, of course, moneys they received for stocks delivered on that day (*fol. 434*).

At the close of the day they sent their check for the entire amount of the day's demand note, and the bank would return their note stamped "paid" (*fol. 411*).

Each day a new demand note would be delivered and each day that note would be paid off by three o'clock in the manner stated (*fol. 412*). The bank never knew what

transactions Lathrop, Haskins & Co. had the day before. Lathrop, Haskins & Co. would say they wanted a certain amount of money to clear their loans. What these loans were they did not specify, nor so far as appears from the testimony did the bank know what securities were held as collateral thereto (*fol. 622*).

Mr. Albeck, the bank's assistant cashier, testified that the loan made by the bank to Lathrop, Haskins & Co. on the morning of January 19th, 1910, was known as a clearance loan (*fol. 618*).

But so far as the course of dealing between the bank and Lathrop, Haskins & Co. is concerned there is no evidence to show for what purposes the proceeds of such notes were used by the latter. The defendant alleges that Lathrop, Haskins & Co. applied for a loan on the 19th of January, 1910, to meet their *current obligations* and to pay for stocks purchased and obtain the release of securities deliverable by them on that day.

It would seem, therefore, that the use of the proceeds of those notes was in no way limited or restricted to paying off loans, the words *current obligations* being broad enough to include Lathrop, Haskins & Co.'s office expenses and any of their debts whether secured or otherwise.

Mr. Albeck testified that the bank expected deposits to be made within a reasonable time after the demand notes were accepted by the bank and that the bank's idea was to have deposits made as quickly as possible. If deposits were not made within a reasonable time the bank would call up the brokers to ascertain the cause of the delay (*fol. 624*).

There is no claim that any such demand for deposits was ever made upon Lathrop, Haskins & Co.

Not one specific instance is pointed out where the bank asserted a lien on any of the securities in the possession of the bankrupts obtained by means of checks certified by the bank or otherwise.

So far as the course of dealing between the bank and the bankrupts is concerned all that has been shown is that a

new loan would be made daily by the bank on a demand note of the bankrupts, which would be paid at the close of the day by the latter's check.

The defendant has not established that the use of the proceeds of the demand notes was limited and restricted.

There is not a bit of evidence that would tend to show any custom or usage by which the bank was to have a lien on any securities or other property in the hands of the bankrupts to secure the demand loan.

#### THE CUSTOM AS TESTIFIED TO BY MR. KILBORN.

Mr. Kilborn, vice-president of the defendant, testified that it was the custom in Wall street that banks furnish a credit so that brokers can clear their stocks. It is a credit which is extended so that they can pay up their loans and take up securities they have purchased, with the understanding that this credit is to be made good, either by check or *the placing of a loan with the bank to make good the credit extended to them* (fol. 486).

This testimony simply amounts to a statement that the demand loan was to be paid in some way or other before the close of the day. There is nothing in the custom or usage, as testified to by Mr. Kilborn, that in any way tends to show that the bank was to have a lien on securities in the possession of the brokers or that there was any agreement for the bank to have any such lien.

It was to be paid by check or by the placing of a new loan with the bank. There is not even a suggestion that the securities obtained with the proceeds of the demand note were to be delivered to the bank either in payment of or as collateral security therefor.

It is significant also that the custom or usage which the answer alleges applied to banks in the City of New York is now limited and restricted to banks in Wall street.

### MR. CARSE'S VERSION OF THE CUSTOM OR USAGE.

Mr. Carse, the vice-president of the Hanover National Bank, has a more comprehensive conception of the custom or usage sought to be established.

"The broker in the morning figuring up the amount of stocks or securities he has to pay for or the loans that he has to turn over, makes up a demand note for a round amount and sends it up to our loan desk with his passbook; we make a loan for the amount, enter it in the passbook and credit it on the ledger; a memorandum of this amount is made on the certification book, together with the amount of balance to the credit of the account at the opening of business, and from time to time during the day any deposits that are made for the credit of the account and against such credits we certify checks that are presented during the course of the day by the broker. When the day's work is cleared up the broker sends up a check to the loan clerk for the same amounts as the notes. We stamp the note paid and return it to him, and the check going through the books as a charge, offsets the credit that was made on the loan in the morning" (*fol. 560*).

In the case of small customers only the bank would ask them to specify on the back of the note what securities they were going to clear (*fol. 676*).

The deposits made by brokers to whom the demand loan is made are not labelled in any way and the bank cannot tell whether the checks deposited were received by the brokers on transactions for which he is supposed to have made the so-called clearance loan (*fol. 705*).

The bank does not care where the broker gets the money from to pay the demand loan so long as it is paid. Whether it comes from the particular transaction for which the broker is supposed to have made the demand loan or from other transactions makes no difference to the bank (*fol. 706*).

In order to pay off the demand loan, the brokers borrow

regular call money on the Exchange, sometimes from the very bank making the demand loan (*fol. 665*).

There was no case of which the witness has any knowledge where the securities to obtain which the demand loan was supposed to be made, were brought to the bank and simply kept as collateral security for the clearance loan.

There was only one case in all of Mr. Carse's wide experience where the securities for the release of which the day loan was supposed to be made were received and in that case the bank made a new call loan on the securities and the proceeds of the new loan were used to pay the clearance loan.

In all other cases the demand loans were paid in money or check (*fol. 605*).

It was the understanding that the broker should pay off the demand loans by *good certified checks and not by forcing loans on the bank* (*fol. 657*).

Mr. Carse's discussion of the legal effect of the transaction, his opinion and his conception of the understanding between the bank and broker with reference thereto are not competent under the authorities as proof of any usage or custom and should be disregarded (*fol. 655-7, 662*).

The answer alleges a custom or usage by which securities obtained with the proceeds of a demand loan were to be delivered to the defendant as security for that loan at the close of the business day.

The witness with his wide experience knows of no case where that was done.

#### THE CUSTOM OR USAGE AS TESTIFIED TO BY MR. ALEXANDER.

At the very outset it should be borne in mind that the National Bank of Commerce, of which Mr. Alexander is vice-president, uses, in making so-called day and clearance loans, a form of demand note in which it is expressly provided that the securities obtained with the proceeds of the

note are to be held in trust for and deposited with the bank as follows (*Plaintiff's Exhibit 16, fol. 817*):

"It is expressly agreed that the stocks, bonds, or other securities, or the proceeds thereof, purchased by the undersigned with, or which may come into possession or control of the undersigned, out of the moneys loaned by said bank, and evidenced by this note shall be by the undersigned, or its agent, or representative, held in trust for and deposited with said bank, it being the intention and agreement of the undersigned to pledge and deposit with said bank and to subject the lien and control of said bank as such pledgee the securities or moneys so acquired, as collateral to this obligation and to any other obligation or indebtedness of the undersigned to said bank."

Any testimony given by Mr. Alexander on the subject of day loans is based, not on any custom or usage, but on the express written contract that his bank makes with its customers, which is entirely different from the contract made between the bankrupts and the defendant.

In fact, the use of that express agreement is strongly indicative of the fact that there is no custom or usage for the bank to have a lien on securities in the possession of the broker, but that it is a matter of contract solely. The witness testified that he did not think that the forms used by the different banks were uniform (*fol. 761*).

There was just one case in the experience of this witness where the loan was not paid during the day. In that case the broker had his securities locked in the vault, and Mr. Alexander obtained a trust receipt for the securities, which specified them in detail, and made a new call loan on them.

Mr. Alexander was not willing to let the broker keep the securities overnight under the day loan agreement. The reason he assigns for this is that he wanted the loan to bear interest overnight, is hardly convincing, when as a Wall street man Mr. Alexander undoubtedly knew that any demand loan bears interest from the time of a demand (*fol. 786, 791*).

### METHODS OF OTHER BANKS.

The First National Bank and the Bank of the Manhattan Company, two banks in Wall street, making so-called day or clearance loans enter into a written contract with the broker by which the latter agrees to hold certain specified securities obtained with the proceeds of the day loan in trust for the bank (*fols. 825, 836*).

If there is a custom or usage so well known and commonly accepted, so definite and certain as is urged by the defendant, why do two of the large Wall street banks find it necessary to make an express written agreement upon the subject?

### THE ALLEGED CUSTOM OR USAGE IS NOT UNIFORM.

It is clear that no two banks consider the custom or usage the same. Each bank has a different agreement, and beyond the hope and belief that the money loaned is to be repaid from some source each bank has a different custom or method of doing business and a different expectation (*Adams vs. Otterback, 15 How., 539*).

The securities were not separated or marked.

The securities cleared or paid for by the proceeds of the loan were indistinguishably mixed with all of the securities in the possession of Lathrop, Haskins & Co., and they drew from the mass for any and all purposes indiscriminately. And when the bank received the securities in suit pursuant to their demand they received securities from the mass without discrimination as to source. To say now that there was a contract for a lien arising by usage is to accuse the officers of the bank of acting with a laxity surprising.

The notes specify the security. The demand notes provide that the bank shall have a lien upon all securities in its possession and the right to demand additional security. This effectively negatives the claim that by contract the bank was to have a lien upon securities not in its possession.

## THE CUSTOM OR USAGE IS IN CONFLICT WITH WELL-SETTLED PRINCIPLES OF LAW.

The law is clear that he who desires security must have possession, constructive or actual, of the securities. A vague agreement to secure is never enforced where bankruptcy intervenes. No reason is shown here why the rule of law should not apply (*Corn Exchange Bank vs. Nassau Bank*, 91 N. Y., 74).

## THE SECURITIES IN SUIT WERE NOT DELIVERED TO DEFENDANT, PURSUANT TO ANY CUSTOM OR USAGE.

During two-hours' wait for securities not one word was said about the bank's right to the securities by virtue of any custom. The bank asserted no claim to the securities, but asked for them as a matter of favor. The bank did not know what securities were received with proceeds of the demand note. It did not ask Lathrop, Haskins & Co. to account for such securities, to tell them what had become of the securities the bank was entitled to.

The bank asked for any and all securities the bankrupt had.

It had one motive only.

It wanted to be protected and secured.

Of the securities delivered to the bank a number were not even in loans on January 19th and had nothing to do with the demand notes of that day.

The bank's receipt contains nothing to indicate that the securities were the property of the bank.

No new loan was made by the defendant, as all of the witnesses called by defendant testify is usually done.

The defendant took the securities as collateral to demand notes, an occurrence which, according to the testimony of its own witnesses, is entirely unheard of.

## V.

*Any custom or usage for the bank to have a lien on securities in the possession of Lathrop, Haskins & Co. is inadmissible and incompetent, as tending to change and vary the terms of the written agreement between the parties (the demand notes).*

Judge STORY said :

“ An express contract of the parties is always admissible to supersede, or vary, or control, a usage or custom: for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom.”

*1837, STORY, J., The Schooner Reeside, 2 Sumn., 567, Fed. Cas., No. 11,657.*

The express written agreement entered into by the bankrupt with the defendant is the two demand notes for \$500,000.

They provide that the bank “ shall have a lien upon all property of the undersigned now or hereafter in its possession or under its control, as security for any indebtedness of the undersigned now existing or hereafter contracted, with the right at any time to demand additional security, etc.” (*fol. 439*).

The parties to the written contract have expressed themselves, definitely and explicitly, on the subject of the securities on which the bank was to have a lien. There is nothing uncertain, nothing doubtful or equivocal about the scope of the lien as thus expressed.

It is not to be presumed that the parties would provide in writing for a portion only of the security or for a lien on securities only that were in the possession of the bank, where a written provision for securities in the hands of the bankrupt was much more necessary and essential, if the bank’s right to such additional securities was intended to be made effective by the parties.

A usage of the New York Stock Exchange cannot be proved to show that a person who has agreed to purchase stock within a certain time shall be entitled to dividends previously declared, because such usage would be inconsistent with the rules of law and contradict the plain terms and legal effect of the contract.

*Hopper vs. Sage, 112 New York, 530.*

Proof of a custom is not admissible to show that an absolute written contract to furnish all coal needed between certain dates was not to be binding in case of a strike.

*Covington vs. Coal Co. (Ky.), 89 S. W., 1126.*

Where an insurance policy provides that there be a proof of loss in writing, evidence of a custom to send a blank form therefor to the insured, when the company is notified of the fire, is not admissible to excuse the failure to make such proof.

*Bomsyweski vs. Co., 186 Mass., 589.*

**THERE MUST BE AMBIGUITY OR UNCERTAINTY UPON THE FACE OF A WRITTEN INSTRUMENT ARISING OUT OF THE TERMS USED TO JUSTIFY EXTRANEous EVIDENCE OF USAGE, AND IT MUST BE LIMITED TO THE CLEARING UP OF THE OBSCURITY.**

It is not admissible for the purpose of adding new stipulations to the contract.

*O'Donohue vs. Leggett, 134 New York, 40;*  
*Oelricks vs. Ford, 64 U. S., 49;*  
*Barnard vs. Kellogg, 10 Wall., 383.*

The contract was prepared and furnished by the defendant, and it is elementary that the words of an instrument are to be taken most strongly against the party employing them.

The contract provides specifically that the bank shall have a lien on securities in its possession. "*Expressio unius est exclusio alterius.*" Yet the bank seeks to invoke a custom and usage in this case which adds entirely new terms to the contract and one which gives the bank in addition an entirely different lien than expressly provided for in the contract, a lien on securities in the BROKER'S possession.

The contract shows a loan. To add a provision thereto that the bank is to have a lien on the proceeds of the loan not only adds to and varies the express provisions of the written contract, but is absolutely repugnant to its legal effect.

Where the parties have chosen to prescribe for themselves the terms and conditions of the loan they must be held to abide by them.

The defendant contends that the rule which excludes parol evidence and usage to vary the terms of a written instrument, applies only between the parties to the instrument. That such rule does not apply between strangers to the instrument is true, but it is well settled that it applies *between the parties and their privies*; and those who claim through a party title or rights under the contract are privies within the rule.

This is right on principle. The parol evidence rule is one of construction only, and not of legal policy, and the construction determines the extent of the right which the party had and could pass on.

*Selchon vs. Stymus, 26 Hun, 145;*  
*Coleman vs. Bank, 53 New York, 388;*  
*Wigmore on Ev., Vol. 4, § 2446.*

**VI.*****The defendant has no equitable lien.***

The securities were not separated or marked but were mixed with the general mass of securities in the bankrupt's possession. There was no agreement to separate or distinguish them in any way. The bankrupts drew from the mass indiscriminately. When the securities were delivered they were withdrawn from the mass without any reference to their source or to any substitution. Part of the mass had been cleared from loans and part had not, and those that had been so cleared, were cleared by checks drawn against an account representing monies from all sources.

*Casey vs. Cavaroc, 96 U. S., 467;*  
*Torrance vs. Bank, Supreme Ct. of Kan., 71*  
*Pac., 235, 11 Am. B. R., 185;*  
*Long vs. Bank, 147 Fed. Rep., 360;*  
*Johnston vs. Hoff, 133 Fed. Rep., 704;*  
*Pollock vs. Jones, 124 Fed. Rep., 163, 10*  
*Am. B. R., 616;*  
*Bank vs. Johnson, Supreme Ct. of Neb., 10*  
*Am. B. R., 208 (Not elsewhere reported);*  
*Ryttenberg vs. Shefer, 137 Fed. Rep., 313;*  
*Matthews vs. Hardt, 79 App. Div., 570.*

In *Casey vs. Cavaroc, 96 U. S., 467*, the creditor bank gave acceptances against stocks and securities which were by agreement set apart as security and then re-delivered to the discount clerk to facilitate substitutions. The debtor bank failed and its receiver sued to recover for these securities which had been removed in contemplation of insolvency.

**BRADLEY, J., page 488, says:**

"The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception;

for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

In *Torrance vs. Bank*, Supreme Court of Kansas, 11 Am. B. R., 185, a bank advanced money to enable a contractor to build a grain elevator, relying upon the promise of the contractor to repay the same out of payments on the contract price as it was paid. Within the four months' period the contract indorsed and delivered to the bank a draft received in part payment of the contract price.

*GREENE, J.*, page 188, says:

"There is no provision in the statute protecting executory contracts for security. This question has been quite frequently before the courts under previous bankruptcy acts, as well as under State insolvent laws, and, while these statutes differed from one another and from the present bankrupt law, there was no material difference between them and the present law upon this question. It has been generally held that an agreement made when a debt is created to give security, but not consummated until within the period excluding preferences, is voidable by the trustee as preferential."

In *Long vs. Bank*, C. C. A., 8th Cir., 147 Fed. Rep., 360, the bank obtained as security an agreement from the bankrupt, who was conducting a small mercantile business, that he would dispose of his stock and pay the bank, and to carry an insurance of \$7,000, and an assignment of sufficient insurance money, in case of loss, to pay the bank. A loss occurred and the bankrupt paid the bank from insurance moneys within the four months' period. It was held that the bank had no equitable lien and the payment was a preference.

In *Johnston vs. Huff*, C. C. A., 4th Cir., 133 Fed. Rep., 794, one White was boarding the laborers engaged in building a railroad. Pay for the board was made by the rail-

road by deducting the amount from the wages and paying the same to White. White obtained credit for the necessary supplies from Huff by giving as security an order on the railroad for all moneys that might be due to him. Sometime later White defaulted and the order was presented one day before the filing of the petition in bankruptcy. It was held that Huff had no equitable lien upon the moneys in the hands of the railroad due to White.

In *Bank vs. Johnson*, Supreme Court of Neb., 10 Am. B. R., 208, the bank as security for a present advance took a mortgage on 76 described steers. They were a part of a larger number and separation and appropriation was made within the four months' period. The appropriation was held a voidable preference.

When the bank certified the checks it had under the most favorable construction of circumstances only a vague sense of safety because the proceeds would likely be in the hands of the brokers. The transactions of the day made the complete change and the credit could not be extended and then withdrawn. The claims of the other creditors arise very largely from the transactions of that day, and they, too, did not intend to give credit for more than a day. They expected that their transactions would be completed in due course as among brokers.

Where a lien on goods sold and delivered as security for the purchase price is expressly contracted for and fails for want of possession or separation, or because the purchaser was permitted to consume or sell the goods, the seller is entitled to no equitable lien upon the goods remaining in the hands of the buyer or upon proceeds thereof. And where in such case possession or separation comes within the four months period the transfer takes place as of that date.

*Re Liberty Silk Co.*, 172 Fed. Rep., 535; *Pontiac Buggy Co. vs. Skinner*, 158 Fed. Rep., 858;

*Fourth St. Bank vs. Milbourne Mills*, 172 Fed. Rep., 177;

*Re Faulhaber Co.*, 170 Fed. Rep., 68 ;  
*Skilton vs. Codington*, 185 New York, 80 ;  
*Re Dismal Swamp Co.*, 135 Fed. Rep., 415 ;  
*Re Charles Klingaman*, 101 Fed. Rep., 691,  
 4 Am. B. R., 254.

*In re Liberty Silk Co.*, 172 Fed. Rep., 535, HOUGH, D. J., says :

"The wholesome rule is summarily stated in *re Gracewich*, 115 Fed. 87, that when property is delivered to a vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee."

An express promise to pay out of a given fund is not an equitable assignment of that fund and is not effective against the trustee in bankruptcy of the promisor.

*Christmas vs. Russell*, 81 U. S., 69 ;  
*Williams vs. Ingersoll*, 89 New York, 508 ;  
*Dillon vs. Barnard*, 21 Wall., 430 ;  
*Smedley vs. Speckman*, 157 Fed. Rep., 815.

*Sexton vs. Kessler*, 172 Fed., 535; 225 U. S., 90, is plainly distinguished from this case by the following features :

(1) There was an express agreement in writing purporting to give a specific lien on specified securities.

(2) The securities were actually designated, specified and set apart. The creditor was notified of what securities had been set apart, and also of any changes from time to time as made.

(3) The debtor treated the stocks as appropriated and subject to a superior lien. In the present case the debtor with perfect right treated the securities as his absolute property. Lathrop, Haskins & Co. never dreamed that the defendant had a lien on those securities, nor did the

defendant either, apparently, and no lien was acquiesced in on delivery, but delivery was made with an allegation of preference and for purposes of safe keeping.

### VII.

*The doctrine of equitable subrogation is not applicable to this case.*

Reference is made to the treatment of this aspect of the case by the learned Special Master (*fols. 976, et seq.*).

The doctrine of equitable subrogation applies where a party is compelled to pay the debt of a third person in order to protect his own rights or to save his own property.

The doctrine of subrogation requires :

*First.*—That the person seeking its benefit must have paid a debt to a third party before he can be substituted to another's rights. *Second.*—That in doing this he must not act as a volunteer but on compulsion to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in the case of a surety or a prior mortgagee.

*Etna Co. vs. Middleport, 124 U. S., 534;*  
*Schimm vs. Budd, 14 N. J. Equity, 234;*  
*Sanford vs. McLean, 3 Paige, 117.*

In *Etna Co. vs. Middleport, 124 U. S., 534*, MILLER, J., said:

"One of the principles lying at the foundation of subrogation in equity in addition to the one already stated, that the person seeking this subrogation must have paid the debt is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that, being forced under such circumstances to pay off the debt of a creditor who had some supe-

rior lien or right to his own, he could, for that reason, be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor."

In order that one having no interest to protect who pays the debt of another or advances money for the purpose may be entitled to succeed to the rights of the creditor in respect to the debts so paid, *there must be a convention or agreement to that effect.*

In *Bowder & Co. vs. Hill*, 136 Fed. Rep., 821, LURTON, J., said at page 823 :

"The mere fact that one pays off a debt at the instance of the debtor or lends money to pay off such debt does not entitle him to subrogation to the liens of the creditors so paid off.

The subrogation may result from a direct agreement between a debtor and a third person who pays the debt, that he shall be subrogated to all the rights and securities existing in behalf of the creditor whose debt is paid off, but nothing short of an express agreement to that effect will move a court of equity in behalf of such a creditor.

*A mere understanding upon the part of such a third person under no obligation to pay the debt, that he by such payment will be subrogated to the liens of the creditor is not enough.*"

In the case at bar the equitable doctrine of subrogation has no application for the following reasons :

- (1) The agreement of loan in no way limits the use of the moneys.
- (2) There was no breach of contract by the bankrupts in applying the moneys as they did.
- (3) There was no agreement for subrogation.
- (4) The securities cleared were used by the bankrupts without distinction.
- (5) It is unknown to what extent the securities were under pledge, and hence to what extent they were cleared.

(6) It is unknown to what extent the moneys that cleared the securities came from the loan and to what extent they came from the bank balance and deposits of the bankrupts with the defendant.

(7) The other claims against the estate arose largely from transactions entered into that same day and it would be inequitable to prefer defendant.

## VIII.

### *Measure of Damages.*

Complainant is entitled to recover \$154,300, the value of the securities at the date of delivery, with interest to the date of the final decree, April 11, 1912, and interest on the decree.

If the Court allows the defendant to return the securities with the dividends, the defendant should be charged with interest on all dividends received.

The final decree purports to follow the Master's report, but fails to do so in that the alternative money judgment is nearly \$1,000 less than what it should be, based on the Master's report.

Since there has been a further depreciation of the securities subsequent to April 11, 1912, the time of the final decree, the court should provide that the defendant should be charged with such depreciation. This is loss pending the appeal.

Defendant claims to still hold the securities delivered, and claims the right to return the securities with the dividends received, and compel the loss from depreciation to fall on the estate.

At the date of delivery, January 19, 1910, the securities had a conceded value of \$154,300 (*fols. 131, 287*). On April 5, 1910, the date of the stipulation to effect their

sale, they were worth \$149,706.25 (*fol. 1182-3*). On April 25, 1910, the date of confirmation of that stipulation, they were worth \$144,918.75 (*fol. 1182-3*). On October 17, 1910, the date of the Master's report, they were worth \$116,287.39 (*fol. 1047*). On February 26, 1912, the date of the hearing before the Master on the accounting, they were worth \$116,568.75 (*fol. 1184*).

The depreciation from January 19, 1910, to February 26, 1912, is over \$37,500. The interest on \$154,300 for the same period is above \$19,000. The dividends received during the same period amount to little over \$9,000 (*fol. 1154*).

The securities were all "listed" and hence could readily have been disposed of at any time. They were also of speculative nature and subject to fluctuation.

The bank at first deposited the 200 shares of Hocking Coal & Iron Company under the plan of reorganization of that company. It later withdrew the same and refused to participate, and this stock is absolutely worthless (*fol. 1046*), and the bank would tender it back. The trustee took part in the re-organization to the extent of the shares held by him and now holds stock of considerable value.

The bank has been drawing dividends on these stocks and hence must have transferred them to itself.

#### (a) THE BANKRUPTCY ACT.

The statute gives the trustee the right to recover the value of the securities or the securities themselves at his election.

§ 60b provides :

"If a bankrupt \* \* \* shall have made a transfer, and if at the time of the transfer \* \* \* the transfer then operate as a preference \* \* \* it shall be voidable by the trustee and he may recover the property, or its value from such person."

The natural and legal meaning of these words is that the

trustee shall have the election to recover either the securities or their value.

*Collier on Bankruptcy, 8th ed., 1910, p. 675.*

*In re Phelps, 3 A. B. R., 396; (not elsewhere reported.)*

"The option of suing for the property or for its value rests with the trustee. These words (property or its value) are doubtless merely expressive of the rule of law. The judgment should include interest from the date of the preference. In most cases the value, *i. e.*, damages, is demanded. This in effect ratifies the title which passed through the preference."

*Collier on Bankruptcy, 8th ed., 1910, p. 675.*

The action is one in equity for an accounting. The demand for relief simply follows the words of the statute, and demands judgment,

"decreeing that the transfer \* \* \* be set aside, and that the defendant deliver up to the complainant herein *all of the said securities so transferred or the value and proceeds thereof, etc.*"

It is elementary that in this form of action the complainant need not charge the defendant until the defendant had rendered its account. Disclosure of the disposition made of the stocks and of the profits or losses realized or sustained therefrom must precede the precise formulation of complainant's claim.

The defendant is in the position of one who wrongfully withholds property of the complainant with respect to which it cannot make a profit and for which it must fully account in equity. It is a trustee *ex maleficio*.

If the securities had appreciated in value and they had been sold, the complainant could claim the proceeds, and if they had not been sold, could demand their return.

(b) AUTHORITIES.

The circumstances are aggravated by the fact that the defendant knew when it took the securities that a petition in bankruptcy was about to be filed and a receiver was about to be appointed on that very day, and all this, in fact, did occur upon that day.

The complainant cannot be made to suffer, nor can the creditors of the bankrupt's estate be made to suffer because the defendant wrongfully took securities to which it had no right or claim.

*Ommen vs. Talcott, 175 Fed. Rep., 261.*  
*Houghton vs. Steiner, 92 App. Div., 171.*  
*Crampton vs. Valido Co., 60 Vt., 291.*

In *Ommen vs. Talcott* (175 Fed. Rep., 261), the trustee in bankruptcy in a suit in equity was seeking to charge a preferred creditor with the value at the time of delivery of merchandise delivered to said preferred creditor and constituting a preference. The goods had been sold under a contract between the receiver and the creditor. In sustaining such contract, *HAND, J.*, says:

"If the receiver gave up no rights, the defendant got no protection from the contract, because without it he had the power to sell off the stock. He would have been in no worse situation without the contract than with it, for without it the complainant could have done no more than elect to charge him with the value, or the proceeds according as it was to his interest and to refuse to allow him his expenses, and that is precisely what he wishes to do, as it is. On the other hand, the obvious purpose of the receiver, as the contract states, was to get the stock sold as soon as possible. While it is true that he might have thrown out the credits if the defendant sold or held the defendant for the depreciation of the goods, if he did not, the defendant might have preferred to let the stock remain unsold and fight the issue of depreciation, instead of real-

izing upon the goods and being obliged to lose all his expenses.

\* \* \* \* \*

By December 19, 1902, the defendant had received clear intimation that the receiver regarded his possession as wrongful, for he attempted by summary order to obtain possession. It is, of course, quite true, at least in theory, that a subsequent trustee might not agree with the receiver, but I am satisfied that the defendant took his chances in retaining possession after that time, and that no demand was necessary. From then on he became a trustee *ex maleficio*, having seized from the estate property which he had no right to retain and which he knew was being claimed."

In *Crampton vs. Valido Marble Co.*, 60 Vt., 291 (a case involving a preference under the Vermont Insolvency Act), VEASEY, J., said :

"We think there was no error in the instructions to the jury as to the rule of damages. It was the value of the property at the time the defendant took it."

The Bankruptcy Act of 1867, § 35, was as to the point involved substantially identical with § 60b herein referred to, and, therefore, the decisions under that Act are applicable here.

*First National Bank vs. Jones*, 88 U. S., 325.

*Shuman vs. Fleckenstein*, Fed. Cas., 12826.

In *First Nat. Bank vs. Jones* (88 U. S., 325), Mr. Justice CLIFFORD, page 545, says :

"That the measure of damages is the value of property seized and sold by virtue of the execution issued on the judgment obtained against the debtor.

Instead of that it is contended by the defendants that the amount realized by the defendants is conclusive as to the value of the property seized and sold; but the plaintiff was not a party to that proceeding, and the express provision of the Bankrupt

Act is that the assignee may in such a case recover the property, or the value of it, from the person so receiving it or so to be benefited by it. Sold as the property was at a judicial sale, it cannot be recovered in specie and the only remedy of the assignee is for value of it, and no doubt is entertained that the rule prescribed as the measure of damages by the Circuit Court is correct."

In *Shuman vs. Fleckenstein* (*Fed. Case, 12826*), the assignee in bankruptcy sued at law to recover the value of goods transferred as a preference. The defendant demurred and set up for cause the want of an allegation of demand for the return of the goods. DEADY, *D. J.*, notes that the original taking was not wrongful and that it required wrongful retention to make it so, and says:

"The assignee is as much entitled to recover damages for an injury to, or detention of, the goods as to recover the possession of them, and under the Code as well as at common law such damages may be recovered in the action to recover possession.

Although the bankrupt act declares that the assignee may recover the property or its value, it is to be construed as giving the right to recover the latter, only as a substitute for the former in cases where the property has been destroyed or passed beyond the control of the creditor, or *been constructively converted to his own use by a refusal to deliver the same upon a due demand of the assignee*. In the latter case the assignee has the *option to sue for the property or the value*. But an action to recover the value of property can only be maintained when the property itself has been actually or constructively converted to the use of the defendant, and the complainant must therefore allege a conversion in terms or its legal equivalent—a demand and refusal."

Where the trustee sues the preferred creditor at law for conversion it is well settled that the measure of damages is the value of the property at the time of taking.

*Stern vs. Meyer, 99 App. Div., 427.*

*Merritt vs. Halliday 107 App. Div., 596.*

It is well settled that this is one way in which the complainant in a suit in equity may charge the defendant, and

there is no reason why equity should not follow the law in this particular kind of case.

(c) THE VALUE OF THE SECURITIES SHOULD BE TAKEN AS OF THE DATE OF THE TAKING JANUARY 19, 1910.

The defendant by its answer seeks to justify the taking of the securities.

In a similar case, *Bank vs. Jackman* (204 U. S., 522, 524), Mr. Justice McKENNA said:

"The bank, it is true, demurred to the complaint and urged as a ground of demurrer the absence of an allegation of a demand. But the bank did not stand on the demurrer. It answered, and not only traversed the allegations of the plaintiff, but set up an independent defense, and showed that a demand would have been unavailing, and a demand is not necessary where it is to be presumed that it would have been unavailing."

Demand was made on defendant on February 18, 1910 (*fol. 1171*).

The letter of the receiver dated January 20, 1910, apprised the defendant of the claim of the estate, but did not constitute an election of remedies after the refusal of said demand (*fol. 1168*).

The defendant relied below upon the case of *Wasey vs. Holbrook* (141 App. Div., 336).

In that case the plaintiff asked for the return of the stocks and damages for the difference between the value of the stocks at the time of the taking and at the time of the judgment. The Court denied the right to recover the depreciation of the stock, but this decision is based, as will appear from the opinion, upon the failure of proof on the part of the plaintiff. The Court says:

"The evidence does not clearly and satisfactorily establish the fact"

that there had been any depreciation (*see Opinion, p. 338*). The Court further found that

"full and complete relief can be given the plaintiff by directing the appellant to return the certificates

of stock in question and requiring him to account for any dividends or benefits derived from them during the time he held the same."

The situation is entirely different in the present case. The difference between the two measures of damages amounts to about \$47,000.

The object of the Bankruptcy Act is not restitution merely, but full indemnity or compensation to the estate for the loss which it has suffered at the hands of a wrong-doer.

**(d) STIPULATION OF APRIL 5, 1910.**

On April 5, 1910, the securities had depreciated over \$4,500 and the depreciation was continuing (*fol. 1182*). The bank and the trustee then entered into a stipulation for the sole purpose of effecting a sale, and the substitution of the proceeds to the position of the securities. This sale never took place and hence the rights dependent thereupon never accrued. The intent of the parties is shown by the following provisions :

"It being the intention of the stipulation that the securities in the possession of the National City Bank shall be converted into money at the best prices obtainable, and that all rights of the parties shall remain against the proceeds of the sale of the said securities the same as they existed against the securities themselves at the time of the making of the stipulation."

The whole scope of the stipulation is to effect a sale. In case of no sale the stipulation is entirely inactive.

Again, "such sales to be without prejudice to the rights of either the bank or the trustee, etc.,"; and "this stipulation shall not alter the rights or claims of any of the parties."

To hold that complainant has stipulated away his right to charge defendant for depreciation, although there has been no sale, is both contrary to the plain meaning of the

stipulation taken as a whole, and contrary to the express intent as well.

Considering the stipulation as taking effect upon a sale only, it has a reasonable meaning, as the estate prevents further depreciation and to an extent liquidates its claim, but to consider it as taking effect in case of no sale is to give the stipulation the effect and meaning of subjecting the estate to the acts of the bank without possible advantage in return. It would be a mere gratuity. This is a forced and unreasonable construction.

The stipulation was not to obtain the discretion of the officers of the bank. The estate without the stipulation could charge the bank with the value of the securities if it did not sell, and could charge it with the selling price if it sold and it was advantageous so to do.

The terms "may be sold by the bank \* \* \* at such times as may seem best to the officers of the bank" allowed the bank a reasonable time to sell pursuant to the stipulation. This phase does not have the force to entirely change the purpose of the stipulation, and allow rights to accrue which are expressly stipulated to accrue only on a sale—"this stipulation shall not alter the rights of any of the parties."

This stipulation to sell has been perverted into a stipulation not to sell. It is not that the bank may sell or not and the estate shall be precluded from recovering for depreciation. It is that the bank shall sell within a reasonable time, and if it does the proceeds shall be substituted for the securities.

This stipulation was designed to protect the bank in the event of a sale, but in no other event.

#### REASONING OF THE COURT.

In the opinion confirming the Master's report upon the trial of the action, the District Court said :

"This is a suit in equity to recover the actual securities in specie; that is the prayer, and that was

what was intended. It is quite likely that the trustees may have had the right to sue at law after rescinding the transfer and making demand, because the refusal would have been a conversion. However, he did nothing of the kind, but proceeded in equity to reclaim his securities, and he cannot now blow hot and cold. The decree will be for the delivery of the securities with any dividends received upon them" (*fol. 1120*).

Upon the accounting the Master considered himself bound by this expression of the court (*fol. 1119*).

It is submitted that the foregoing is a misconception of the action. In the first place, the complaint follows the statute and the complainant need not elect how he would charge the defendant until the accounting.

In the second place, the action is brought in equity to rescind the transfer, and the complainant could charge defendant with the value at time of the transfer, with interest. The Court seems to feel, temporarily, that because the action was in equity the purpose must necessarily be to recover back the *res in specie*. The Circuit Court of Appeals overruled this view and should have reversed the case on the measure of damages (*p. 340*).

The District Court then held that under the stipulation of April 5, 1910, complainant could not charge defendant with the depreciation of the securities. The Court says: "To construe the stipulation" so as to charge the bank with loss in case of no sale "would be to produce the greatest incentive to an immediate sale. The purpose of the stipulation was certainly not that, but to get the advantage of the bank's best judgment as to the time to sell."

This reasoning, of course, is based upon the previous holding that because the action is in equity the complainant must take back the securities, however depreciated, if the defendant wishes to tender them. Only from such a position is there any sense in saying that the trustee gained anything by having the bank's judgment on the time of sale, for otherwise the trustee could charge defendant with

the value of the securities, or with their proceeds in case of an advantageous sale.

The Circuit Court of Appeals held that defendant was chargeable with the value at the time of making, but for the stipulation (*p. 240*). The finding by the Master and confirmation thereof by the Court that the stipulation changed the rights of the parties, was due to their prior holding that the action was to recover the securities only, and when this later was reversed, the decree should have been reversed on the measure of damages (*fol. 1120-1, 1219, 1226*). The force given to the stipulation was due to their idea that the securities in specie were complainant's only claim, and hence he was interested in obtaining the bank's discretion as to the time of sale. From their point of view the complainant was claiming under the stipulation instead of the defendant, when the rights dependent on the stipulation never, in fact, took effect.

It is submitted that the Court overlooks the fact that the express purpose of the stipulation was to effect a sale and the stipulation was to take effect only in the event of sale. Such construction does not give the "greatest incentive to an immediate sale," but to a sale within a reasonable time. This gives full effect to the words "may be sold \* \* \* at such time as may seem best to the officers of the bank," taken with the rest of the stipulation and the express intent of a sale and substitution of the proceeds. The opinion is silent as to that part of the stipulation which provides "the making of this stipulation shall not alter the rights or claims of any of the parties" (*fol. 1192*).

Of course the sale would work a substitution, but the stipulation was not to alter any rights.

The defendant claimed all the securities from the time of taking. No demand was necessary. Demand was made on April 19, 1910 (*fol. 1211*). The bank seized upon all securities available and took by far the greater part of the marketable securities in the hands of the broker at that time, and has continually held them in defiance of

any claim by the trustee. As to certain of these securities it had no claim of lien. The taking of the securities prevented the sale and caused a loss, and defendant took its chances and should be charged therewith under any theory of the action.

#### DEPRECIATION PRIOR TO APRIL 5, 1910.

This amounted to \$4,593.75 (*fol. 1182*). On March 8, 1910, the trustees wrote to the defendant suggesting a stipulation (*fol. 1200*). On March 9, 1910, defendant answered suggesting that the trustee prepare a form (*fol. 1204*). On March 30th a stipulation was submitted to defendant's attorneys (*fol. 1206*). On April 5th defendant's attorneys excuse their delay and send the signed stipulation to the attorneys for complainant (*fol. 1208*). As to this the Court says: "The trustee "had put the matter in train for settlement *quoad* the time of the sale" (*fol. 1246*), and hence could not charge the bank for depreciation subsequent to March 8, 1910.

It is submitted that no waiver is made out. The bank was a converter. The parties were dealing at arm's length and there is no reasonable ground for claiming that the stipulation took effect before April 5, 1910. And then it provides that it shall not alter any rights (*fol. 1192*).

#### ALTERNATIVE JUDGMENT.

The error into which the Court fell in adopting the measure of damages is illustrated by the alternative judgment (*fol. 1281*). For while the Court held that the defendant might tender back the securities with dividends and interest on the same, it also held that unless the defendant did so the plaintiff should recover the value of the securities at date of transfer (\$57,300) plus interest on the same from the date of the report (October 17, 1911), plus the amount of dividends and interest received, with interest on the same from date of receipt to the date of the report (*fois. 1003-4, 899*). After allowing the defendant to

tender back the securities and dividends at its option, an alternative judgment is provided that is a hybrid and founded on no real basis.

#### ERRORS OF CALCULATION.

The amount of the alternative judgment, \$161,740.62 (*fols. 1281, 1003*), is obtained by adding \$8,137.50 + \$3.12 + \$154,300, and should be \$162,440.62 (*fols. 899-900*). To this is to be added interest on \$154,300 from October 17, 1911, according to the report on the trial of the action.

The final decree, although intended to follow the Master's report, fails to charge defendant with interest on dividends and interest received by defendant (*fols. 1280, 1003-4*).

#### DEPRECIATION SINCE APRIL 11, 1912.

The stocks delivered were of the value of about \$104,700 on September 30, 1913. There has been a depreciation of about \$12,000 subsequent to April 11, 1912, the date of the final decree, and this depreciation should be charged to the defendant.

#### IX.

*The decree should be modified so as to allow the complainant to recover \$154,300 with interest from January 19, 1910. In all other respects the decree should be affirmed.*

October, 1913.

Respectfully submitted,

ABRAM I. ELKUS & WILLIAM A. BARBER,  
Solicitors for Complainant, Appellee and Appellant.

ABRAM I. ELKUS and  
WESLEY S. SAWYER,  
Of Counsel.

**NATIONAL CITY BANK OF NEW YORK v. HOTCHKISS, AS TRUSTEE IN BANKRUPTCY OF HASKINS.****HOTCHKISS, AS TRUSTEE IN BANKRUPTCY OF HASKINS, v. NATIONAL CITY BANK OF NEW YORK.****APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

Nos. 459, 460. Argued October 17, 20, 1913.—Decided November 3, 1913.

Courts may go far in giving financial transactions between banks and customers any form which will carry out the mutually understood intent, *Sexton v. Kessler*, 225 U. S. 90; but if the intent is doubtful or inconsistent with the legal effect of dominant facts it will fail.

An understanding that the proceeds of a loan made by a bank to a customer and placed to the credit of his general account are to be used to take up certain securities does not, in the absence of any special agreement to that effect, create a lien upon those securities, and the delivery of such securities to the bank with notice of the customer's impending insolvency is an illegal preference under the Bankruptcy Act.

A trust cannot be established in an aliquot share of a man's whole property, as distinguished from a particular fund, by showing that trust monies have gone into it.

Although a loan may be made for a specified purpose, if the lender places it in the stream of the borrower's general property there is no right of subrogation.

A general creditor may increase the bankrupt's estate by his advances and lose the right to take them back.

Time may sometimes be disregarded when it is insignificant, but not where it has sufficed to materially change the financial positions of the parties.

These cases are distinguished from *Gorman v. Littlefield*, 229 U. S. 19, and other cases in which there was a specific *res* which identified the fund and separated it from the general mass of the estate.

A notice to a bank demanding securities for a loan made to the bank-

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rupt that bankruptcy was impending and that it was receiving a preference is sufficient to show that the bank had cause to believe that it was obtaining a preference.

Under an agreement, made in a suit by a receiver against a bank to recover securities in specie as an illegal preference, that the bank should hold them pending the decision of the suit with a power to sell in its discretion which had not been exercised, *held* that the bank was only liable for the securities and not for their value at the time the agreement was made.

201 Fed. Rep. 664; 120 C. C. A. 92, affirmed.

THE facts, which involve the determination of whether the delivery of securities by a broker, immediately preceding his bankruptcy, to a bank to secure its loan was an illegal preference, are stated in the opinion.

*Mr. John A. Garver* for appellant in No. 459 and for appellee in No. 460:

The law presumes an agreement or transaction to be legal, when it is capable of a construction which makes it valid. Jones on Evidence (2d ed.), § 85; *King v. Hawkins*, 10 East, 211; *Curtis v. Gokey*, 68 N. Y. 300, 304; *Ormes v. Dauchy*, 82 N. Y. 443.

So as to securing a just debt. *Getts v. Janesville Co.*, 163 Fed Rep. 417; *Re Neill Co.*, 170 Fed. Rep. 481, 484; *Re Leech*, 171 Fed. Rep. 622; *Sexton v. Kessler*, 172 Fed. Rep. 535, 537.

The right to recover a preference is exclusively statutory. The common law favors the diligent creditor. *Tompkins v. Hunter*, 149 N. Y. 117, 121; *Dodge v. McKechnie*, 156 N. Y. 514, 520; *Huntley v. Kingman*, 152 U. S. 527, 532.

A trustee in bankruptcy has, therefore, no power to avoid a preference, except on the precise grounds specified in the statute; and, as the right given is in derogation of the common law, it must be strictly pursued. *Plowden, Comm.* 113; *Sutherland, Stat. Con.*, § 371; *Atkins v. Kinan*, 20 Wend. 241, 249, 250.

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A remedy which is given by statute must be strictly followed. *East Tenn. &c. R. Co. v. Southern Tel. Co.*, 112 U. S. 306, 310; *Campbellsville Lumber Co. v. Hubbert*, 112 Fed. Rep. 718, 724-750; affd., 191 U. S. 70; *Matter of Bryce*, 16 Daly, 443.

A transaction, such as this, which does not diminish the fund distributable among the creditors is not repugnant to the statute. *County Bank v. Massey*, 192 U. S. 138, 147; *Bank of Newport v. Herkimer Bank*, 225 U. S. 178, 184; *Gorman v. Littlefield*, 229 U. S. 19, 25; *Continental Trust Co. v. Chicago Title Co.*, 229 U. S. 435.

This rule applies even where the account is not active and where two payments have been made without any intermediate sale. *Re Sagor*, 121 Fed. Rep. 658; *Jaquith v. Alden*, 189 U. S. 78; *Yaple v. Dahl-Milliken Co.*, 193 U. S. 526; *Wild v. Provident Trust Co.*, 214 U. S. 292, 296.

There are no other creditors of the same class.

A payment is objectionable under § 60 only when it has the effect of enabling one creditor to obtain a greater percentage of his claim than other creditors of the same class. *Swartz v. Fourth Natl. Bank*, 117 Fed. Rep. 1; *Crooks v. People's Bank*, 46 App. Div. 335.

The classification referred to in § 60a is not the same as that providing for a priority in the payment of debts in § 64b. As to differences in classification, see *Re Belknap*, 129 Fed. Rep. 646; *Re Barrett*, 6 Am. Bkey. Rep. 199; *Re Harpke*, 116 Fed. Rep. 295, 297; *Re Denning*, 114 Fed. Rep. 219, 221; *Gomila v. Wilcombe*, 151 Fed. Rep. 470.

There is no proof that the bankrupts intended to give preference.

Prior to the amendment of 1910, the trustee in bankruptcy was required to prove, in a suit of this kind, that the creditor knew that the bankrupt actually intended to give a preference. *Hardy v. Gray*, 144 Fed. Rep. 992; *Re First Natl. Bank*, 155 Fed. Rep. 100 (C. C. A. 6th); *Bank v. Graves*, 156 Fed. Rep. 168; *Tumlin v. Bryan*, 165

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Fed. Rep. 166; *Re Leech*, 171 Fed. Rep. 622; *In re Sayed*, 185 Fed. Rep. 962; *Kimmerle v. Farr*, 189 Fed. Rep. 295; *Debus v. Yates*, 193 Fed. Rep. 435. As to the effect of the amendment, see *Alexander v. Redmond*, 180 Fed. Rep. 192, and cases cited in brief for appellant, in *Mechanics Bank v. Ernst* (*post*, p. 64).

Defendant did not have reasonable cause to believe it was obtaining a preference. *Irish v. Citizens' Trust Co.*, 163 Fed. Rep. 880.

The conduct of defendant's officers in asking for the securities on that day is entirely consistent with the understanding and usage of the business, and is in direct accord with the written contract, that clearance loans shall be taken care of before the close of business hours.

Subrogation exists. The tendency is to extend subrogation to every possible case for the protection of one advancing money for discharging obligations carrying security. *Matthews v. Fidelity Title Co.*, 52 Fed. Rep. 687, 689.

Subrogation is allowed in every instance in which one party pays a debt for which another is primarily liable, and which, in equity and good conscience, the latter should have discharged. *Stevens v. King*, 84 Maine, 291; *Dunlop v. Adams*, 174 N. Y. 411, 416; *Atlantic Trust Co. v. Kinderhook Co.*, 17 App. Div. 212; *Louis v. Bauer*, 33 App. Div. 287, 293; *Peters v. Meyer*, 72 App. Div. 585; *Gans v. Thieme*, 93 N. Y. 225; *Pease v. Egan*, 131 N. Y. 262, 273; *Moorehouse v. Bklyn. Heights Co.*, 185 N. Y. 520, 524; *Title Guarantee Co. v. Haven*, 196 N. Y. 487; *Lidderdale v. Robinson*, 2 Brock. 159, 168.

The only exception is that it will not be applied to defeat the superior or equal equities of third persons. 4 Pom. Eq. Juris. (3d Ed.), § 1419, note; *Union Tr. Co. v. Monticello R. R. Co.*, 63 N. Y. 311, 314.

The bankruptcy courts should apply the doctrine recognized in the state courts. *Hewitt v. Berlin Works*, 194 U. S. 296; *Thompson v. Fairbanks*, 196 U. S. 516;

*Humphrey v. Tatman*, 198 U. S. 93; *Sabin v. Camp*, 98 Fed. Rep. 974.

Equity will not permit technicalities or even serious obstacles to stand in the way of the enforcement of the principle of subrogation. *Peters v. Meyer*, 72 App. Div. 585; *Gans v. Thieme*, 93 N. Y. 225; *Pease v. Egan*, 131 N. Y. 262; *Cobb v. Dyer*, 69 Maine, 494.

It is not necessary that the person to be subrogated should pay the creditor directly. It is sufficient if he advances the money for the purpose of enabling the debtor to pay the debt. *Building Assn. v. Thompson*, 32 N. J. Eq. 133; *Merchants' Bank v. Tillman*, 106 Georgia, 55; *Sgobe v. Cappadonia*, 8 App. Div. 303; *Peters v. Meyer*, 72 App. Div. 585.

The proceeds of the loan constituted a trust fund. *Sexton v. Kessler*, 172 Fed. Rep. 535, 544.

This loan was made in conformity with an established custom between banks and their broker customers. A general custom is the common law itself, or a part of it; even written contracts will yield to such custom. *Walls v. Bailey*, 49 N. Y. 464, 471; *Elkus on Secret Liens*, 83, § 150.

There was a special fund held by the bankrupts for a specific purpose, to be used in protecting and enhancing the value of the general assets, and having, consequently, such character that no general creditor could claim any right to share in it. *Gorman v. Littlefield*, 229 U. S. 19, 25; *Fourth Street Bank v. Yardley*, 165 U. S. 634.

*Mr. Abram I. Elkus*, with whom *Mr. Wesley S. Sawyer* was on the brief, for appellees in No. 459 and appellants in No. 460.

**MR. JUSTICE HOLMES** delivered the opinion of the court.

This is a suit by a trustee in bankruptcy to recover certain securities alleged to have been transferred to the

defendant bank by way of preference. The plaintiff had a judgment in the District Court, 200 Fed. Rep. 287, *id.* 299, and in the Circuit Court of Appeals, 201 Fed. Rep. 664; 120 C. C. A. 92. Both parties appeal; the plaintiff upon a subordinate question as to its right to elect damages instead of a return of the securities.

The case arose upon what is known in New York as a clearance loan. Brokers need large sums to clear or pay for the stocks that they receive in the course of the day, and as the stocks must be paid for before they are received and can be pledged to raise the necessary funds, these sums are advanced by the banks. They are returned later on the same day by making deposits to the borrower's account and drawing a check to the order of the bank. Perhaps such a general course of dealing might be arranged so as to give a lien on the loan or its proceeds until payment, but the question whether such a lien has been created rarely, if ever, has arisen, the whole business being finished in a few hours. It is, however, the main issue in this case.

The bankrupts were brokers in partnership and at ten o'clock on January 19, 1910, had assets exceeding their liabilities by nearly half a million dollars. These assets consisted largely in the stock of a coal and iron company in which there was a pool. Before twelve, there was a break in the market, the stock went down and at about noon the suspension of the firm was announced. A petition in involuntary bankruptcy was filed at ten minutes after four on the same day. At about ten, the bank made a clearance loan to the bankrupts of \$500,000 in the usual way to enable them to meet their current obligations and to get the stocks deliverable on that day, the bank receiving demand notes and both parties acting in good faith. The sum was credited in the deposit account of the firm, in addition to \$54,319.98 already there, and soon after the bank certified and subsequently paid checks amounting

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to \$535,920.74. During the day the firm made deposits which are not in question, but there remained due upon the loan \$166,166.69. Officers of the bank noticing the drop in the stock went to the firm, demanded payment or securities to make good the obligations to the bank, and were told of the suspension and that a petition in bankruptcy would be filed. After two hours discussion the securities in question were delivered between 2 and 3 p. m., but the officers were told that the delivery was a preference. Some of the securities bore no relation to the loan; others and, it may be assumed for purposes of argument, most, had been released by the money thus obtained.

In dealing with transactions of this kind we may go far in giving them any form that will carry out the mutually understood intent. *Sexton v. Kessler*, 225 U. S. 90, 96, 97. But if the intent was doubtful or inconsistent with the legal effect of dominant facts, it must fail. For instance, apart from possible exceptions, a man cannot retain a domicile in one place when he has moved to another and intends to reside there for the rest of his life, by any wish, declaration or intent inconsistent with the dominant facts of where he actually lives and what he actually means to do. *Dickinson v. Brookline*, 181 Massachusetts, 195. In the present case it is agreed that it was expected and understood that no portion of the clearance loan was to be used for any purpose other than to clear securities. But on the other hand, by consent of the bank as it seems, the loan was put into the general deposit account, which was drawn upon for general purposes, at least to the extent of the balance above the loan; the securities released were not kept separate but were used like any others; and no separate account was kept of money received from deliveries of stock so released. What happened as between these parties was simply that all monies received in the course of the day from whatever source went into the firm's

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deposit account with the bank. So that, even if we take it, as a corollary of what was understood, that the use of the clearance loan was expected to enable the firm to repay the loan, it does not appear to have been expected that the proceeds should be appropriated specifically to that end, but simply that the addition of such proceeds to the general funds of the firm would enable the latter to pay within the time allowed. This is the view of the facts taken by the master and both of the courts below. They also found that an attempt to give the matter a different complexion by custom had failed; and if we went behind their findings we should take the same view.

A trust cannot be established in an aliquot share of a man's whole property, as distinguished from a particular fund, by showing that trust monies have gone into it. On similar principles a lien cannot be asserted upon a fund in a borrower's hands, which at an earlier stage might have been subject to it, if by consent of the claimant it has become a part of the borrower's general estate. But that was the result of the dealings between these parties, and it cannot be done away with by a wish or intention, if such there was, that alongside of this permitted freedom of dealing on the part of the bankrupts, the security of the bank should persist. It is not like the case of property wrongfully mingled with general funds and afterwards traced. All that the parties agreed either expressly or by implication was that the debt incurred at ten o'clock should be paid by three. Some banks seem to have required the dealing to be conducted on the footing of a fund identified and subject to a trust at every step, but between these parties there was no attempt to follow a specific fund through a series of changes until it was returned. See *Dillon v. Barnard*, 21 Wall. 430.

As all trace of the bank's money was lost when it entered the stream of the firm's general property there can be no right of subrogation. Neither can a claim be upheld on

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the ground that there was no diminution of the bankrupt's assets, or that the transaction should be regarded as instantaneous and one. The consent to become a general creditor for an hour, that was imported, even if not intended to have that effect, by the liberty allowed to the firm, broke the continuity and established the loan as part of the assets. No doubt many general creditors have increased a bankrupt's estate by their advances, but they have lost the right to take them back. Time sometimes can be disregarded when it is insignificant. But in this case half the time between the loan and the transfer of securities sufficed to change the position of the borrowers from a fortune of half a million to a deficit of double that amount.

In both *Gorman v. Littlefield*, 229 U. S. 19, and *Richardson v. Shaw*, 209 U. S. 365, in addition to the personality of the holder there was also a specific stock, which identified the fund relied upon and separated it from the general mass of the estate. *Hurley v. Atchison, Topeka & Santa Fé Ry. Co.*, 213 U. S. 126, stood on the peculiar facts of the case, which were held to point to an identified *res* and give an immediate claim against it. The case established no general proposition contrary to what we now decide.

The suggestions that it does not appear that the bankrupts intended to give a preference or that the bank had reasonable cause to believe that it was obtaining one, hardly need answer. The bank did not confine its demand to proceeds of the loan but asked for and obtained securities without regard to their source. It was notified in terms that it was receiving a preference and that the firm was going into bankruptcy. If this was not sufficient notice it is hard to imagine what would be enough.

The cross appeal depends upon the frame of the bill and effect of an agreement between the parties. On April 5, 1910 it was agreed that the securities in question might be sold by the bank "at the best price obtainable, at such

times as may seem best to the officers of" the bank; that the rights of both parties "shall attach to the proceeds realized from the sale" and "the amount realized from the sale of the said securities shall stand in lieu of the securities and shall represent the amount of the liability" of the bank to the trustee in bankruptcy in case of judgment against it. "The making of this stipulation shall not alter the rights or claims of any of the parties, nor change the jurisdiction of any court . . . it being the intention of the stipulation that the securities in the possession of the National City Bank shall be converted into money at the best prices obtainable, and that all rights of the parties shall remain as against the proceeds of the sale of the said securities the same as they existed against the securities themselves at the time of making this stipulation."

It seems that no sale took place. The decree was for a delivery of the securities with all interest and dividends thereon received and in default thereof for \$161,740.62 with interest from the date of the master's report. But as the securities have declined a good deal below their value at the time of conversion and again below their value at the date of the foregoing agreement, the trustee claims the right to take the sum named, with corrections. This was answered sufficiently by Judge Hand in the District Court. As he observed, the suit was in equity to recover the securities in specie. After the agreement the bank was authorized to hold them until it thought it wise to sell. If it had sold, there can be no doubt that the plaintiff's claim would have been limited to the proceeds, by the words of the contract. Its judgment not to sell, exercised for the benefit of both parties, cannot have been intended to put it in a worse position. Such an understanding would have deprived the plaintiff of the judgment of the bank.

*Decree affirmed.*